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No. 80-504

In the Supreme Court of the United States

OCTOBER TERM, 1980

SAM MILLER McDONALD, PETITIONER

v.

THE STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is as yet unreported at the date of preparation of the Petition for Writ of Certiorari. It is expected that the opinion will be reported in the Southwest Reporter, Second Series. A copy of the opinion is contained in the appendix hereto. (App. A).

JURISDICTION

The opinion and judgment of the Court of Criminal Appeals of Texas was delivered and entered on March 19, 1980. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether Petitioner was denied a fair trial and due process of law by the trial court's action in sequestering the jury after the conclusion of the trial, calling juror witnesses on behalf of the State and admonishing several jurors that they might be held in contempt, and questioning juror witnesses on behalf of the State in an attempt to demonstrate that no error resulted when the trial court allowed the jury to separate after the charge had been delivered.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States of America, Amendment, XIV, §1:

"...nor shall any state
deprive any person of life,
liberty, or property, without due
process of law."

STATEMENT OF FACTS

Disposition of the Case

Petitioner was indicted by the grand jury of Fannin County, Texas, for the offense of murder on February 11,

1977. Upon trial in the 6th Judicial District Court of Fannin County, Texas, the jury returned its verdict on April 20, 1977, whereby it found the Petitioner guilty of voluntary manslaughter. On April 21, 1977, the jury returned its verdict in the punishment phase of the trial, assessing punishment of 15 years confinement in the Texas Department of Corrections. Petitioner's Motion for Mistrial and Amended Motion for New Trial were overruled, judgment was entered, and Petitioner was sentenced by the court to the Texas Department of Corrections for 15 years. (App. B).

On appeal, the Court of Criminal Appeals of Texas affirmed the conviction in its opinion delivered March 19, 1980. Petitioner's Motion for Rehearing before the Court of Criminal Appeals of Texas was overruled on April 28, 1980(App. F). Thereafter, the mandate of the Court of Criminal Appeals of Texas for execution of judgment issued on

After the charge on the guilt-innocence phase of the

Petitioner's Motion for Stay of Mandate before the Court of Criminal Appeals of Texas was denied on May 6, 1980. Petitioner's Motion for Stay of Mandate before the United State Supreme Court was denied on May 9, 1980.

Pertinent Facts

Petitioner was indicted in the shooting death of one R.N. Hartline, which occurred in the kitchen of Petitioner's home on December 12, 1976. Petitioner alleged that the shooting occurred in self-defense when the decedent entered Petitioner's home uninvited and assaulted him with a butcher knife, after angrily berating him for not signing a document of release.

After the charge on the guilty-innocence phase of the trial had been read to the jury on April 20, 1977, and after the State's attorney and Petitioner's attorney had made their opening arguments to the jury, the trial court announced to the jury that a brief recess would be taken. During the recess the jury members were to telephone home, if desired, in order to notify their families that they

would be late in returning home from the courthouse. Members of the jury then dispersed from the courtroom, without the supervision of a bailiff, and entered the halls and offices of the courthouse. Estimates of the length of the recess vary from five to thirty minutes. The record indicates that jurors used telephones available in both the district clerk's office and the county attorney's office.

Immediately after the jury had returned its verdict assessing punishment in this case, the trial court instructed the jury to return to the jury room and informed counsel that the court would, on its own motion, undertake an inquiry into the conduct of the jury during the recess on the previous day. Petitioner objected to the proposed hearing on the ground that there was no provision for such a procedure in Texas law, that such a hearing would impair his federal constitutional right to a fair trial, and that such action on the part of the court would prejudice Petitioner's rights under Texas law and impair his ability to demonstrate the existence of harmful error upon motion for new trial. Petitioner's objection was overruled and his exception duly recorded. (App. C, 519-520).

Thereafter, the trial judge conducted his questioning of the jurors individually. All initial questions posed with an eye toward showing that no harm resulted from the separation were propounded by the trail judge. The State's attorney made no inquiry during the entire course of the hearing. The trial judge informed the first three juror-witnesses that they could be held in contempt of court if their testimony revealed that improper discussion of the case was had during the separation. When each juror-witness was called, the trial judge took the first opportunity to question each witness regarding possible violation of his specific orders. Petitioner's inquiry, in each case, was undertaken after court had thoroughly questioned the witness.

Petitioner moved for mistrial on the grounds that the post-trial hearing was in violation of the Code of Criminal

Procedure of the State of Texas, and the Fourteenth Amendment of the United States Constitution, which guarantees the right to a fair and impartial trial. (App. C, 602-604).

Petitioner's Amended Motion for New Trial, based in part on the separation of the jury and the improper hearing conducted by the judge, was refused and overruled by the trial court. Petitioner's attorney was unable to engage jury members in any discourse in order to determine whether or not impermissable discussion had occurred during the separation, and the nature and extent of possible harm suffered by Petitioner thereby. (App. D).

PRESERVATION OF FEDERAL QUESTION

Petitioner objected before the trial court that the unauthorized separation of the jury denied him a fair trial and that the conduct of the post-trial hearing would work to deny him his right to a fair and impartial trial as guaranteed by the federal constitution. [1](App. C, 519-520). The objection was overruled. In his Amended Motion for New Trial, Petitioner presented his argument that the unauthorized separation of the jury during the course of the trial worked to deny him due process of law, as guaranteed under the Fourteenth Amendment of the United States Constitution. (App. D). Additionally, the Amended Motion for New Trial asserted that the trial court's unauthorized conduct of the post-trial hearing denied Petitioner a fair and impartial trial "as guaranteed

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[1]/ Petitioner has included, as Appendix C herein, a portion of the court reporter's transcript of the proceedings of the trial court. The pages of Appendix C are numbered according to the page numbers appearing at the bottom right hand corner of the record as designated by the clerk of the trial court. Petitioner has included herein the official transcription of the examination of the first juror-witness in the post-trial hearing (App. C, 526-532).

by Amendment VI of the Constitution of the United States." The Amended Motion for New Trial was denied by the trial court.

On appeal to the Court of Criminal Appeals of Texas, Petitioner asserted in his third and fourth grounds of error that the separation of the jury, without the consent of Petitioner, violated his "constitutional and statutory rights under the 6th and 14th Amendments to the Constitution of the United States,. . ." and that the separate questioning of each member of the jury under oath after the return of the verdict was reversible error. (App. E). The Texas Court of Criminal Appeals did not discuss or apparently consider the federal question.

While the invocation of the federal due process rationale at each stage of the proceedings has not been a model of clarity and consistency in the instant case, it is maintained that Petitioner has adequately raised the federal question in his assertion of the due process violation inherent in the trial court's intertwined acts of allowing the unauthorized separation of the jury, and subsequently attempting to demonstrate the harmlessness of such error through an unauthorized and improper post-trial hearing.

SUMMARY OF ARGUMENT

In affirming the conviction of the trial court, the Court of Criminal Appeals of Texas refused to find that Petitioner was denied due process of law in the conduct of the post-trial hearing. As a result of the trial court's assumption of the prosecutorial role in the hearing, the displacement of the settled presumption of harm, the "chilling" of witness responses by the judge's inquisitorial posture, the foreclosure of valid, accurate and truthful factual reports from the jurors, and the resultant impossibilty of obtaining proof regarding possible misconduct on the unauthorized separation of the jury, Petitioner was denied a fair trial and due process of law under the United States Constitution. Decisions of the Supreme Court have recognized that it

offends due process for a judge to try a case when he has an interest in the outcome. Just such an interest was manifested in the trial court's highly irregular and unusual hearing, where the judge sought to demonstrate that his error in allowing separation of the jury had created no harm to Defendant. The Supreme Court has recognized the unfairness of commingling the functions of prosecution and decision-making. The conduct of the post-trial hearing in the instant case offends the historical standards of fair trial and due process of law as pronounced by this Court. The result of such improper commingling of functions in the instant case was the obstruction of Petitioner's ability to demonstrate the harm which occurred as a result of the erroneous separation of the jury.

REASON FOR GRANTING PETITION

Petitioner was denied due process of law in the trial court's allowance of an unauthorized separation of the jury and the subsequent conduct of a post-trial hearing which was calculated to destroy Petitioner's ability to demonstrate the harm incurred by such jury separation.

Under the Texas Code of Criminal Procedure, separation of the jury after the critical delivery of the charge to the jury is prohibited. [2]The decisions of the Court of Criminal Appeals of Texas have held that, where a separation

[2]/ ". . .When jurors have been sworn for a felony case, the court may, at its discretion, permit the jurors to separate until the court has given its charge to the jury, after which the jury shall be kept together, and not permitted to separate except to the extent of housing female jurors separate and apart from male jurors, until a verdict has been rendered or the jury finally discharged, unless by permission of the court with the consent of each party." Tex. Code Crim. Proc. Ann. art. 35.23 (1966). Neither Petitioner nor his counsel consented to the separation of the jury in the instant case.

occurs after the charge is given at the guilt stage of the trial, a presumption of harm to the defendant attaches, placing the burden on the prosecution to show that no injury resulted or could not have reasonably resulted from such separation. Skillern v. State, 559 S.W.2d 828, 830-832 (Tex.Crim.App. 1977); Goodall v. State, 501 S.W.2d 342, 343 (Tex.Crim.App. 1973). There is no special procedure under the Texas Code of Criminal Procedure by which the state may attempt to demonstrate that defendant was not harmed by the separation of the jury. Under the Code, should a defendant's motion for new trial be overruled and a judgment of conviction delivered, the state's evidence regarding harm through separation of the jury would be heard upon the defendant's motion for new trial. [3] At this juncture, the state would properly be allowed to controvert the motion of the defendant, presenting evidence through affidavits or testimony at a hearing on the motion for new trial. [4]

In the case at bar, several procedures and presumptions of Texas law were upset when the trial court initiated a post-trial hearing on its own motion, in an

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[3]/ Art. 40.03, Tex. Code Crim. Proc. Ann. (1979), provides:

"New trials in cases of felony, shall be granted the Defendant for the following causes, and for no other:

. . .

(2) where the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant;"

[4]/ "The state may take issue with the Defendant upon the truth of any cause set forth in the motion for a new trial; and in such case, the judge shall hear the evidence, by affidavit or otherwise, and determine the issue." Tex. Code Crim. Proc. Ann. Art. 40.06 (1979).

attempt to establish that no harm resulted from the court's error in allowing the jurors to separate. It is Petitioner's contention that the separation of the jury and the subsequent unusual and unauthorized post-trial hearing combines to deny him a fair trial and due process of law.[5] At the very heart of the post-trial hearing was the determination of whether harm resulted to Petitioner by virtue of the separation. Petitioner contends that the course and conduct of the hearing by the trial court impaired his fundamental right to due process of law.

Petitioner argues that the decisions of this Court demonstrate that it is violative of the basic requirement of due process when a judge tries a case in which he has an interest in the outcome. In re Murchison, 349 U.S. 133, 136 (1955). Clearly, fairness requires an absence of actual bias on the part of the judge in the trial of cases. "But our system of law has always endeavored to prevent even the probability of unfairness. To this end'... no man is permitted to try cases where he has an interest in the outcome.' " Id.

[6] Though such an "interest in the outcome" cannot be defined with precision, Petitioner suggests that careful consideration of the circumstances and relationships of the

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[5]/ Petitioner does not argue that separation of the jury, after the charge of the court, constitutes a per se denial of due process of law. It is the foreclosure of the Petitioner's ability to demonstrate the harm which resulted from the separation, and the displacement of the settled presumption of harm, which Petitioner attacks as violative of due process, in combination with the separation.

[6]/ In Murchison, this Court held that the Fourteenth Amendment forbade a judge who had charged the witnesses with contempt while conducting a "one-man grand jury" from presiding over the subsequent trial for contempt.

post-trial hearing in the instant case reveals a fundamental interference with the basic requirements of a fair trial and a fair tribunal.

The relevant inquiry in the instant case is whether the situation of the trial court in the post-trial hearing is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused. . . ." Tumey v. Ohio, 273 U.S. 510, 532 (1927).[7]

Petitioner submits that an inherent unfairness results where a judge adopts the prosecutorial function of attempting to satisfy the state's burden of proof in showing that no harm resulted from the judge's own substantial error. The unfairness inherent in a commingling of the prosecutorial and decision-making duties was underscored by the Supreme Court in Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950). Department regulations of the Immigration and Naturalization Service, requiring the presiding inspector to interrogate and cross-examine an alien and his witnesses and to present evidence on behalf of the government before deciding the issue, were found to be improper. The Court indicated that to hold otherwise might bring the procedure "into constitutional jeapardy."

Petitioner does not challenge the well established power of the trial court to interrogate witnesses in an effort to elicit the truth in a hearing. See: Glasser v. United States, 315 U.S. 60, 82 (1942). However, in the instant case, the interrogation by the trial judge went far beyond the

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[7]/ Tumey involved the convict of direct pecuniary interests of a judge whose regular salary as town mayor was paid from fees and costs levied by him against alleged violators. See also: Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972).

ancillary judicial questioning expected and necessary to elicit truthful witness responses. Here the examination on behalf of the state was conducted entirely by the trial court, to the complete exclusion of the State's attorney. Petitioner submits that such self-interested overreaching on the part of the trial court disregarded the "fundamental fairness essential to the very concept of justice,. . .in a way that necessarily prevents a fair trial." See: Lyons v. State of Oklahoma, 322 U.S. 596, 603 (1944). The "chilling" of the witness responses by virtue of the judge's questioning, after having delivered warnings to all of the jurors during the course of the trial and giving specific perjury warnings to three of the juror witnesses during the post-trial hearing, effectively foreclosed Petitioner's opportunity to elicit valid, accurate and truthful factual reports from the jurors. [8] This procedure created a barrier to Petitioner's ability to obtain proof and "fatally infected the trial" in prohibiting Petitioner from demonstrating the harm resultant from the unlawful separation of the jury. See: Lisenba v. People of California, 314 U.S. 219, 236 (1941).

The combined effect of the pre-verdict separation of the jury and the post-trial hearing was to deny those "fundamental principals of liberty and justice which lie at the base of all our civil and political institutions." Palko v. Connecticut, 302 U.S. 319, 325, 328 (1937) (Citations omitted). [9] Justice

[8]/ To deny Petitioner relief on the grounds that the record does not demonstrate harm, when his ability to so demonstrate was prejudicially foreclosed by the conduct of the trial court, presents a non-sequitur which offends the fundamental notions of due process. See also: Bell v. Wainwright, 299 F.Supp. 521, 523 (N.D. Fla. 1969).

[9]/ While the substantive ruling in Palko was overruled in Benton v. Maryland, 395 U.S. 784 (1969), the essence of the remarks still obtains. Cf.: Roe v. Wade, 410 U.S. 113 (1973).

Frankfurter emphasized that "regard for the requirements of the Due Process Clause 'Inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings {resulting in a conviction} in order to ascertain whether they offend those cannons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with most heinous offenses.' " Rochin v. California, 342 U.S. 165, 169 (1952) (citation omitted). Petitioner suggests that the post-trial hearing in the instant case was a sham, organized to deny Petitioner the benefit of the settled state law presumption of harm and to effectively impair his ability to demonstrate the harm which resulted from the unlawful jury separation.

The dual role of judge and prosecutor operative under the statutes of Puerto Rico was found to offend due process of law in Figueroa Ruiz v. Delgado, 359 F.2d 718 (1st Cir. 1966). The court rejected the Commonwealth's attempt equating the challenged practice with the accepted right of questioning afforded a federal trial judge. The distinction is that the intervention of the Commonwealth's judge, under Puerto Rico procedure, was not ancillary - but was "fundamental, and continuous throughout the trial. Even more important, he is primarily motivated to speak only on one side." Id., at 720. The court recognized that the mental attitudes of the judge and prosecutor are at variance. [10]/ The commingling of the functions of the judge and the prosecutor in the same person "affected the very integrity of the fact finding process in such a way that it might lead to the conviction of an innocent person." Pales De Mendez v. Aponte, 294 F.Supp. 311, 314 (D.P.R. 1969).

Other courts have commented that a merger of the functions of prosecutor and judge "injects an element

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[10]/ "To keep these two personalities entirely distinct seems an almost impossible burden for even the most dedicated and fair-minded of men." 359 F.2d at 720.

of improper interest into a procedure and otherwise 'lacks the appearance of that degree of fundamental fairness essential to the concept of justice, and hence denies the accused in such cases due process of law.' " Haley v. Troy, 338 F.Supp. 794, 804, n.2 (D.Mass. 1972); [11] United States v. James, 440 F.Supp. 1137, 1142 (D.Md. 1977); [12] Wounded Knee v. Andera 416 F.Supp. 1236, 1241 (D.S.D. 1976). [13] A number of federal appellate courts, while not treating the federal due process question, have recognized the dangerous propensity for injustice inherent where the trial judge overreaches in the examination of witnesses. e.g.: Groce v. Seder, 267 F.2d 352, 354-355 (3rd Cir. 1959); Martucci v. Brooklyn Children's Aid Society, 140 F.2d 732, 734 (2nd Cir. 1944); In re United States, 286 F.2d 556, 561-562 (1st Cir. 1961), rev'd on other grounds sub nom Fong Foo v. United States, 369 U.S 141 (1962).

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[11]/ In Haley, the district court disapproved the established practice of a local municipal court justice in ordering women welfare recipients appearing before him in any matter to sign non-support claims against their husbands or the fathers of their children, and then trying such complaints on the merits.

[12]/ The federal district court in James found that a magistrate's adoption of the prosecutorial role in presenting the government's case, to the exclusion of the officer who appeared to conduct the government's prosecution, would deny due process of law to the accused. 440 F.Supp. at 1142.

[13]/ The procedure in the tribal court, where one individual served simultaneously as tribal judge and tribal prosecutor, was deemed so inherently unfair as to violate due process of law as guaranteed to Indian persons under the Indian Civil Rights Act, 25 U.S.C. § 1392 (8).

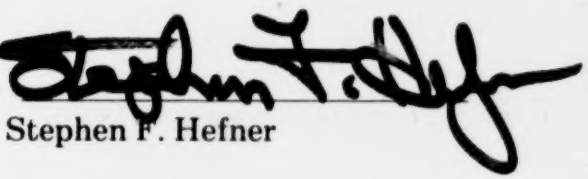
The cumulative effect of the errors of the trial judge in allowing the separation of the jury after the charge, initiating the hearing on his own motion where he assumed the entirety of the state's burden, displacing the settled presumption of harm, and foreclosing Petitioner's ability to obtain proof regarding misconduct on separation, was such as to offend the integrity of the trial process and deny Petitioner due process of law as guaranteed under the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SAM McDONALD, Appellant

NO. 58,823 vs. - - - -Appeal from FANNIN County
THE STATE OF TEXAS, Appellee

OPINION

This is an appeal from a conviction for voluntary manslaughter. Punishment was assessed by the jury at fifteen years.

The sufficiency of the evidence is not challenged.

In his first two grounds of error appellant challenges denial of his objections to the jury charge at the guilt stage of the trial for failure to submit the defensive issues of defense of third persons, V.T.C.A., Penal Code Sec. 9.33, [1] and deadly force to protect property, V.T.C.A., Penal Code Sec. 9.42. [2] We find no error because the evidence did not raise these issues.

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[1]/ Sec. 9.33 provides:

"A person is justified in using force or deadly force against another to protect a third person if:

"(1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 of this code in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and

"(2) the actor reasonably believes that his intervention is immediately necessary to protect the third person."

[2]/ Sec. 9.42 provides:

"A person is justified in using deadly force against another to protect land or tangible, movable property:

"(1) if he would be justified in using force against the other under Section 9.41 of this code; and

"(2) when and to the degree he reasonably believes

the deadly force is immediately necessary:

"(A) to prevent the other's imminent commission of arson,burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or

"(B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and

"(3) he reasonably believes that:

"(A) the land or property cannot be protected or recovered by any other means; or

"(B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury."

Briefly stated, the evidence shows that the deceased came to appellant's home regarding a real estate transaction between the two of them. After first discussing the matter on the front porch, appellant went around through the garage and entered this house through the kitchen door. The deceased followed him, and after entering the kitchen he was shot by appellant with a shotgun. Appellant testified that the deceased was belligerent towards him and was coming towards him with a butcher knife picked up in the kitchen, when appellant pulled out the shotgun and fired. He also testified:

"Q. What, in your judgment, would have happened to you if you hadn't done what you did when you did?

"A. In seconds I would have been dead.

"Q. Mr. McDonald, if that had been true who else would have been in that house if you had been dead?

"A. My wife and my two baby girls.

"Q. And who else?

"A. That man.

"Q. Mr. Hartline (the deceased)?

"A. Yes, sir.

"Q. In the back part of your mind, when you acted for yourself, did you have in mind your wife and your baby girls and their welfare?

"A. Yes, sir.

"Q. You say that was your home?

"A. Yes, sir.

"Q. Had you invited this man to come into your house?

"A. No, sir.

"Q. Was he uninvited?

"A. Yes, sir, he was uninvited.

"Q. And did he come in against your will?

"A. Yes, sir.

"Q. So far as you were concerned was he a trespasser?

"A. Yes, sir."

The jury was properly charged on self defense. V.T.C.A., Penal Code Sec. 9.32. One requirement for the defense of third persons, however, is that the defendant reasonably believe his action is immediately necessary to protect the

third person. Sec. 9.33 (2), supra. The evidence in this case showed appellant's wife and daughters were in another part of the house, and there is no evidence of any need for immediate action to protect them from the deceased, or even that any threats were made against them by the deceased.

Under Sec. 9.42 (2), supra, deadly force may be used to protect property only if the defendant had a reasonable belief that such force was immediately necessary to prevent the immediate commission of arson, burglary, robbery, theft at night or criminal mischief at night, or to prevent someone from escaping with property who is fleeing immediately after committing burglary, robbery, or theft at night. No evidence was presented that the deceased was committing any of the listed offenses, or fleeing with property taken in one of the listed offenses. The first two grounds of error are overruled.

Appellant's next two grounds of error, argued together, concern the separation of the jury without appellant's consent after the charge was read at the guilt stage of the trial, in violation of Art. 35.23, V.A.C.C.P., and the subsequent hearing, after return of the punishment verdict, at which the jurors were questioned by the court about their conduct during the improper separation.

Art. 35.23, supra, requires reversal if the jury is allowed to separate without the defendant's personal consent, after the court has given its charge to the jury. Skillern v. State, 559 S.W.2d 828. It is the defendant's burden, however, to insure that the record reflects that he did not consent to the separation. Green v. State, 510 S.W. 2d 919. Once that fact is established, the burden shifts to the State to show that no harm to the defendant occurred as a result of the improper separation. Skillern v. State, supra. When the issue is first raised on appeal, the State is denied the opportunity to show no harm resulted. Green v. State, supra, at 922. When the issue is timely raised in the trial court, the State is entitled to an opportunity

to show that no harm occurred through improper communications or conduct during the erroneous separation. See, Johnson v. State, 467 S.W.2d 247. It would be inconsistent to place the burden on the State to show no harm, and then deny it an opportunity to meet that burden.

The record in this case shows an improper separation of the jury without appellant's consent, in violation of Art. 35.23, supra, but it also shows that after the punishment verdict was returned, the court, on its own motion, held a hearing at which each juror was sworn as a witness and separately questioned about his or her conduct during the earlier separation. The State and appellant's counsel were also allowed to examine each juror-witness at this hearing. The testimony demonstrated that no harm befell appellant during the erroneous separation of the jury.

Appellant presents a multi-faceted argument. He asserts the separation was erroneous, the hearing was unauthorized, warnings by the trial judge to some of the juror-witnesses were intimidating in nature, and the effect on the jurors was to make them unwilling to talk to defense counsel about possible jury misconduct. We will consider each facet in turn.

It is true that the separation of the jury was in violation of Art. 35.23, supra, and was error. Testimony of the jurors at the subsequent hearing, however, showed appellant was not harmed by this error.

Although the post-verdict hearing was not specifically authorized by statute, it is also true that there is no specific statutory procedure for the State to meet its burden in this situation as discussed above. Appellant cites Tsamouris v. State, 472 S.W.2d 141, in which it was held not error to refuse to grant the defendant a hearing on possible jury misconduct immediately after the verdict was returned. That case is first distinguishable in that there is no indication there that misconduct had occurred; here an erroneous separation had occurred. It is also distin-

guised by the fact that a defendant may use a motion for new trial to present evidence on that issue; the State has no such procedure available. We hold it was not error to hold the hearing immediately after the verdict was returned.

Three of the juror-witnesses were admonished by the trial judge about the privilege against self-incrimination and the possibility of contempt charges. While this should not have occurred, Jackson v. State, 318 S.W.2d 98, in each instance the privilege was waived and the juror testified. Also, no objection was raised to the first two of the three who were admonished, which distinguishes this case from Jackson, and, after objection was made to the third juror, no admonishments were given to any of the later juror-witnesses. Under the circumstances we conclude no reversible error is presented.

Regarding the unwillingness of the jurors to discuss their deliberations with defense counsel, we observe such a choice was their privilege, and does not present reversible error.

The third and fourth grounds of error are overruled.

Appellant also argues his next two grounds of error together. They address the trial court's ruling on appellant's motion for new trial.

The motion was filed on July 7, 1977, and was heard on July 15. At the conclusion of the hearing the court took the motion under advisement. Later, on July 22, the court entered its order denying the motion. Neither appellant nor his attorney was present when this ruling was made. When complaint to this was raised at sentencing on July 27, the trial court for a second time denied the motion, this time in the presence of appellant and his attorney. On appeal both adverse rulings are challenged, the first for the absence of appellant and his attorney, and the second for being after the expiration of the twenty days allowed under Art. 40.04, V.A.C.C.P.

Under the circumstances of this case we find no error. Appellant and his attorney were present when all evidence

was heard on the motion on July 15. At the conclusion of the hearing nothing was left to do except render a decision. This is not a case where the time for notice of appeal is measured from the denial of the motion for new trial. See, Art. 44.08 (b), V.A.C.C.P. The event of rendering a decision on the motion, although important for purposes of securing an adverse ruling for appeal, was not a critical stage of the proceedings requiring presence of appellant and his attorney in this case, because there was nothing required of them or permitted for them to do in response to the ruling, such as giving notice of appeal or taking exception to the ruling. We find no error. Furthermore, had no hearing been held, the motion would have been overruled by operation of law after the twentieth day from when it was filed.

Finally, it is argued that evidence presented at the hearing on the motion for new trial shows jury misconduct. Appellant relies on statements supposedly made by the jury foreman during deliberations, and during a telephone conversation with the district clerk. The foreman was not called to testify at the hearing on the motion for new trial. The hearsay testimony of the district clerk does not require the motion be granted. The ground of error is overruled.

The judgment is affirmed.

ODOM, Judge

(Delivered March 19, 1980)

By: Panel 1, 1st Quarter, 1980, composed of
John F. Onion Jr., Presiding Judge
Wendell A. Odom, Judge
W.C. Davis, Judge

APPENDIX B

THE STATE OF TEXAS, PLAINTIFF
VS. NO. 15862
SAM McDONALD, DEFENDANT

JANUARY TERM 1977
DATE: APRIL 21, 1977
JUDGMENT

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of MURDER and this day this cause being called for trial, the State appeared by her duly elected County Attorney and the Defendant, Sam McDonald appeared in person, his counsel, G.C.Harris and Buster Cole, also being present, and both parties announced ready for trial, the said Defendant in open court having been duly arraigned and having pleaded not guilty to the charge contained in the indictment herein on April 19,1977 thereupon a jury, to-wit: W.L. Brewer and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment presented, and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court as to their duty to determine the guilt or innocence of the Defendant and having heard the arguments of counsel, retired in charge of the proper officer to consider of their verdict, and afterward on April 20, 1977 were brought into open court, by the proper officer, the Defendant and his counsel being present, and in due form of Law returned into open court the following verdict, which was received by the Court, and is here now entered upon the minutes of the Court, to-wit:

We, the jury, find beyond a reasonable doubt that the defendant is guilty of VOLUNTARY MANSLAUGHTER.

/s/ W.L. Brewer

Foreman

Thereupon the Defendant having requested that the jury assess the punishment herein, further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider of their verdict and afterwards on April 21, 1977 was brought into open court by the proper officer, the Defendant and his Counsel being present and in due form of law returned into open court the following verdict, which was received by the Court and is here and now entered upon the minutes of the Court, to-wit:

We, the jury, assess the punishment of the defendant at confinement in the Texas Department of Corrections for FIFTEEN YEARS.

/s/ W.L. Brewer

FOREMAN

It is therefore considered and adjudged by the Court, that the said Defendant is guilty of the felony offense of VOLUNTARY MANSLAUGHTER as found by the jury, and that he be punished, as has been determined by the jury, by confinement in the Texas Department of Corrections for a term of FIFTEEN (15) years, and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended, for which execution will issue.

Signed and ordered entered this the 6th day of May A.D., 1977.

/s/ Henry Braswell

Judge, 6th District Court of
Fannin County, Texas, Presiding

APPENDIX C

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MR. HARRIS: You may poll them if you wish to.

THE COURT: All right. Well, is it the request that they be polled?

MR. HARRIS: Yes, sir.

(Whereupon after the punishment phase of the case and the Defendant was sentenced to fifteen years in the Texas Department of Corrections and the jury was polled by the Court the following proceedings were had, to-wit:)

THE COURT: Now, members of the jury, your work is almost finished. I must, however--and I do not think this will take very long but I must ask if you will that you retire to the jury room once more. Please do not discuss the case while you are there.

(Whereupon the jury retired to the jury room.)

(Whereupon the following proceedings were had out of the presence of the jury:)

THE COURT: Now, after the verdict of the jury

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assessing the punishment in this case has been received by the Court and the jury has been polled and the jury has confirmed the verdict of the jury as previously announced assessing punishment at fifteen years in the Texas Department of Corrections the Court will, on its own motion, conduct an inquiry into the conduct and actions of the jurors during the five minute recess taken yesterday afternoon during the final arguments on guilt or innocence.

The Court will call each juror separately to testify under oath as to what he or she did during such recess.

The purpose of the inquiry is to ascertain from the jurors now, while their memory of the events is fresh, what happened during said recess, and the objective being to determine whether any harm has come to the Defendant as a result of such recess.

The Defendant and the State will be granted opportunity to also question the jurors.

At this time, the Court will grant leave to both the State and the Defendant to make any objections to the procedure proposed by the Court.

Mr. Morris?

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MR. MORRIS: The State has no objections, Your Honor.

THE COURT: All right. Mr. Cole?

MR. COLE: The Defendant would object and except to the conduct of this inquiry at this time in this manner for the reason that there is no provision whatsoever, in the Defendant's opinion, for so doing; that conducting the same at this time and this place and under these circumstances is of such short notice to the Defendant that they are denied the opportunity of making their own investigation and do not have a reasonable time within which to do so.

The Defendant further objects and excepts to the conduct of the inquiry at this time for the reason that the Court, on its own motion, permitted the jury to separate after the Court's charge was read to the jury and specifically instructed the jurors to communicate with other and third parties and we have no way at this time of knowing who they communicated with, and that such conduct is in direct violation against the mandatory provisions of the Code of Criminal Procedure which says that the jury, after

the charge is read, shall not be separated.
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Have you got anything else to add to that?

MR. HARRIS: Yes. And, Your Honor, we would like to add upon the further ground, this being the 21st day of April, Thursday, 1976, that the charge was read to the jury on Wednesday the 21st day of April, 1976, and after such charge was read, and in violation of the terms and provisions of the Code of Criminal Procedure of Texas, the jury was permitted to go on its own in recess, unescorted by an officer of the law and without a bailiff, and without authority and law to separate even in the custody or authority of a bailiff, there being no provision in the law to permit such separation.

The Defendant further objects to the Court conducting an inquiry immediately after the verdict has been received on this the 21st of April, 1976, and immediately after and while the jury was still seated in the box in the district courtroom of the courthouse here in Fannin County, Bonham, Texas, instructing the jury to return to their quarters and, in substance, that the Court wanted to conduct an inquiry into what might have happened --

THE COURT: The Court has not stated any such
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thing in the presence of the jury.

MR. HARRIS: Well, I beg your pardon. I withdraw that.

THE COURT: Let's get that straight.

MR. HARRIS: I withdraw that, Your Honor, from

the motion. But has retired them for the purpose of making such inquiry and we object to such inquiry being made on the ground that it is of the Court's own motion and that it is without the perview of the law and is prejudicial and injurious to the rights of the Defendant in this case.

MR. COLE: We object for the further reason that such inquiry is without any authority in law in this type proceeding and that the law requires that once the jury has rendered its verdict that it be discharged and it is no longer under the control of the Court or the attorneys or any other process but, by law, it is discharged. And to confine the jury and require them to remain together violates the Defendant's constitutional and legal rights guaranteed to him by the Constitution of the United States and Texas for a fair and impartial trial.

THE COURT: All right. Let the record reflect

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that this proceeding has been conducted out of the presence of the jury and, to this point, the jury having been excused before the Court announced the procedure which it would follow and the reasons therefor, and the Court will now proceed at this time. It does overrule the objections and gives the Defendant his exception to the ruling of the Court.

I will ask the Bailiff at this time to call the juror Tommy Thompson into the courtroom.

MR. HARRIS: Now, Your Honor, may we ask one question before the jury is returned?

THE COURT: Surely.

MR. HARRIS: You have stated that we may have our bill of exceptions?

THE COURT: Yes.

MR. HARRIS: And we understand that at this juncture of the trial, and after the verdict has been accepted and the jury has, after accepting the verdict of the jury, assessed a penalty of fifteen years against this Defendant, that he is now going to conduct an inquiry of the jury as to their activities during the recess, after the charge was read to them yesterday?

THE COURT: That is precisely what the Court
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has stated.

MR. HARRIS: And we do understand that the Court is going to conduct the inquiry on his own and not permit Counsel to participate in the inquiry?

THE COURT: Absolutely not. If you had heard me I stated to you that both the State and the Defendant would be permitted to question the jurors.

MR. HARRIS: Well, we except to the ruling of the Court in conducting the inquiry on the same grounds and all grounds heretofore stated, Your Honor.

THE COURT: You are correct in your statement that the Court is conducting the inquiry on its own motion. I do want to make that clear. But, as I stated earlier, both the Defendant's Counsel and the State's Counsel may direct any questions they wish to the jurors concerning this limited inquiry, that, namely, the conduct of the jurors yesterday afternoon during the five minute recess which was taken during the final arguments on the guilt or innocence

phase of the case.

MR. HARRIS: And, Your Honor, since we have had these remarks since then we would like for

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our further bill of exceptions on the grounds heretofore stated that is, that it is unauthorized in law, such procedure, and, as Counsel has stated, after the verdict has been received and when the jury is orinarily dismissed and amounts to an inquiry into the jury as to their conduct or conversations with any third parties and their movements which might in any way affect the verdict of this case and might in any way constitute misconduct, and to do it at this time places the Defendant at a disadvantage under the laws of the State of Texas in that this Defendant has a right to make an investigation as to such misconduct after this trial is over, and by so going into this proceeding at this time and immediately after the trial might place the juror in such position as he would be reluctant to reveal contrary or other -- or what actually happened, at a later date.

For all of such reasons, in addition to the ones heretofore named, we except to the ruling of the Court.

THE COURT: Your exception is noted.

MR. HARRIS: Thank you, sir.

THE COURT: Call the first juror, Tommy

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Thompson, please.

MR. COLE: Do we have the bill, Judge?

THE COURT: You do.

MR. HARRIS: The full bill?

THE COURT: Yes.

TOMMY THOMPSON

the witness hereinbefore named, being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

EXAMINATION

BY THE COURT:

Q. Mr. Thompson, your name is Tommy Thompson?

A. That's right.

Q. And you are one of the jurors in this case, it being State of Texas versus Sam McDonald, No. 15,862, on the docket of this Court?

A. Yes, sir.

Q. All right, sir. Now, Mr. Thompson --
MR COLE: If the Court please, could I move up here? I cannot hear the Court.
THE COURT: All right. I will speak up. You may remain where you are. I believe you will be able to hear me.

BY THE COURT:

Q. You will recall that yesterday afternoon during the final arguments on the guilt and innocence phase of this trial I permitted the jurors in this case to go to the District's Clerk's office on this floor of the courthouse to call home, if they desired to do so, and leave word that they might be late getting home. I granted a

five-minute recess for this purpose. You do recall?
A. Yes, sir, I recall it.

Q. I am going to ask you some questions now about what happened during that recess. You, under la[illegible], have a right to refuse to answer on the ground that your answers might tend to incriminate you because, of course, if you did in any way violate the Court's instructions to not talk to anyone about the case and to not talk to certain others about anything you could be punished for contempt. So you do have the right against self-incrimination if you choose to exercise it. Do you understand?

A. Yes, sir.

Q. All right, sir. Are you willing to testify?

A. Yes, sir.

Q. All right, sir. During the recess in question did you talk to anyone about this case?

A. No, sir.

Q. During the recess in question did anyone talk to you about this case?

A. I don't remember if it was --

Q. Well, focus your attention on this particular recess and do your best to recall about it.

A. Well, one little boy asked me what it was about and I told him I wasn't supposed to talk about it.

Q. That was a little boy in the hall or where?

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A. Yes, sir.

Q. All right. Now, is that all you said to the little boy?

A. That was all.

Q. And was that all he said to you?

A. Yes, sir.

Q. Did you make a telephone call during that recess?

A. I did not.

Q. Did you have any contact with anyone other than the little boy that you have already told us about during the recess?

A. No, sir.

Q. Did anyone talk to you about the case during the recess in question?

A. No, sir.

Q. Where did you go during the recess in question?

A. I went right out here.

Q. When you say "right out here" do you mean in the hall just outside the courtroom?

A. Yes, sir.

Q. And then you returned into the courtroom, is that correct?

A. Yes, sir.

Q. Did you overhear anyone else saying anything about the case during the recess?

A. No, sir.

Q. Did you read anything about the case during the recess?

A. No, sir.

Q. Did you see or hear any other juror talking to any witness or attorney in the case?

A. No, sir.

Q. Did you see or hear any other jurors discuss the case with anyone?

A. No, sir.

Q. Did anything happen during the recess in question which,in any way, whether I have asked you about it or not, affected your verdict?

A. No, sir.

Q. During the deliberations of the jury on guilt and innocence and, later, on punishment, did any juror say anything about anything that occurred during such recess?

A. No, sir.

Q. Did you receive any information from any source whatsoever concerning this case during the recess in question?

A. No, sir.

THE COURT: Mr. Morris, do you have questions of the juror?

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MR. MORRIS: The State has no questions.

THE COURT: Does counsel for the Defendant have any questions?

CROSS EXAMINATION

BY MR. COLE:

Q. Mr. Thompson, when you went out into the hall did the jury stay together or did it separate?

A. I think they were all out there in the general area.

Q. But there were lots of other people out there, too, were there not?

A. Yes, sir.

Q. Spectators and witnesses and parties?

A. Right.

Q. And all mingling together?

A. Yes, sir.

Q. And this was after the charge had been read to the jury?

A. Yes, sir.

THE COURT: The record will show that, of course, and that is not up to him to say.

MR. COLE: Sir?

THE COURT: The record will show that it was.

BY MR. COLE:

Q. I think that is all. Wait. I will ask you this;

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how big was the boy you talked to?

A. He was a young boy but he was kind of heavyset.

Q. Well, would you estimate ten, twelve, fourteen years of age?

A. I would say about twelve.

Q. And you don't know his name or identity?

A. I had never seen him before.

THE COURT: Anything further?

MR. COLE: Yes, sir.

BY MR. COLE:

Q. How long were you out there, do you know, in the hall?

A. All that time that we were on break.

Q. You don't know how long you were out there?

A. Five, ten minutes, I guess, something like that.

Q. How many people do you estimate were out in the hall?

A. I don't know. There were several.

Q. Well, ten, fifteen, twenty, twenty-five?

A. About fifteen, I guess.

Q. Besides the jury -- with the jury?

A. I don't know.

MR. COLE: That's okay. That is all right. Thank you, sir.

EXAMINATION

BY THE COURT: Page 506

Q. Mr. Thompson, did anyone out in the hall talk to you or did you talk to anyone other than the twelve-year-old boy that you have already told us about?

A. I may have talked to some of the other jurors but--

Q. Did you talk--

A. --but not about the case.

THE COURT: All right. Thank you, sir. Mr. Thompson, before you go, I want to express the thanks of I am sure the State's counsel and the defense counsel, also, for your service in this case.

You have rendered a very valuable service. We appreciate your doing your civic duty by serving on this jury. I commend you.
You now stand discharged. You are at liberty to discuss the case and the jury's deliberations in the case or anything else concerning the case with anyone else you would choose to discuss it with. Thank you, sir.

(Whereupon the witness was excused.)

THE COURT: I will ask you to call in James E. Ramey from the jury room.

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(Following the questioning of all jurors the following proceedings were had, to-wit:)

THE COURT: Do we have anything else to be presented at this time before we adjourn?

MR. MORRIS: The State does not.

THE COURT: All right. We stand in adjournment.

MR. HARRIS: We want to make a motion, Your Honor.

THE COURT: All right.

MR. HARRIS: Now comes the Defendant in this cause, the above entitled and numbered cause, after the guilty verdict was received yesterday by the Court and the punishment verdict was received today, and after the Court has examined each separate juror, all twelve of them, and after the County Attorney has waived examination and after the Court examined and turned them over to Defense for questioning, and moves the Court to strike and exclude the testimony of each and every juror given upon this hearing, which

hearing was called of the Court's own motion and after he had received the verdict of punishment in this case, for the reason that such hearing is wholly unauthorized by the Code of Criminal Procedure of

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the State of Texas; is injurious and harmful to the Defendant, Sam McDonald, and would be calculated to deprive him a fair and impartial trial as guaranteed under the constitution and laws of the United States.

THE COURT: The motion is denied.

MR. HARRIS: All right, sir. Now come the Defendant, Sam McDonald, in this case, and moves the Court to declare a mistrial, and as grounds for such motion would show that the the verdict of guilty was received yesterday from the hands of the jury by the Court in this case; that the verdict as to punishment was received by the Court from the jury today in this case and that after the Court had received the verdict today he, the Court did, of his own motion, call each juror separately and individually to the witness stand, to the exclusion of the other jurors, and questioned them individually, singly and individually, and the Court questioned the jurors concerning their activities, statements, and discussions made in a recess yesterday when the Court gave the jury, after the Court had read the main charge to the jury and before the jury had retired to deliberate upon said charge, and

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the Court, upon his examination of each juror today sought to elicit from each juror their activities during such recess allowed after the main charge was read, their conversations, if any, their telephone calls, if any, and other

activities during such recess, and after the Court had examined each of said jurors tendered said jurors to the County Attorney, Mr. John Morris, for questioning or examination, and the County Attorney waived examination as to each juror, and such jurors were questioned by Mr. Buster Cole for the Defendant.

The Defendant, as grounds for the motion for mistrial in this case, shows and would show that such hearing is in violation of the Code of Criminal Procedure of the State of Texas and in violation of the Constitution of the United States of America, and particularly the Fourteenth Amendment thereof, which guarantees a man a fair and impartial trial; and for the further reason that the mission of the Court to permit the jury to separate after the reading of the main charge to the jury in this case is in direct violation of the laws of this state and, particularly, the Code of Criminal Procedure of the State of Texas, which is mandatory. Page 578

Whereupon, the Defendant moves and prays that a mistrial be declared in this case.

THE COURT: The motion is denied. The Defendant is given his exception to the ruling of the Court.

MR. COLE: Is that to both motions?

THE COURT: Both motions.
Anything further?

MR. HARRIS: That is all.

THE COURT: We stand adjourned.

STATE OF TEXAS)

COUNTY OF FANNIN)

I, JACK BRYANT, Official Court Reporter in and for the 6th Judicial District Court, Fannin County, Texas, do hereby certify that the foregoing pages numbered 1 through 314, inclusive, contain a full, true, accurate and complete transcript of the Statement of Facts of all of the proceedings had upon the trial of the above entitled and numbered cause.

WITNESS MY HAND this 31st day of October, A.D., 1977.

/s/JACK BRYANT

JACK BRYANT
Official Court Reporter
in and for the 6th
Judicial District
of Texas

APPENDIX D

NO. 15862

THE STATE OF TEXAS / IN THE DISTRICT COURT
VS. 6TH JUDICIAL DISTRICT
SAM McDONALD FANNIN COUNTY, TEXAS

DEFENDANT'S AMENDED MOTION FOR NEW TRIAL

TO SAID HONORABLE COURT:

Now comes the Defendant, SAM McDONALD, in the above entitled and numbered cause, and with leave of the Court first had, and after the Court had by written orders extended the time for the filing of said amended motion for new trial to and including July 8, 1977, and within such time so allowed, files this, his amended motion for new trial, and by same moves the Court to set aside the verdict and judgment rendered against him herein, on the 21st day of April, 1977, and to grant him a new trial for the following reasons, to wit:

1.

Because the Court misdirected the jury as to the law in this case, in that the Court failed to instruct the jury in its main charge to the jury upon the Defendant's right of defense of his habitation and his right to protect his own property, under the terms and provisions of Article 9.41 of the Penal Code of Texas, which misdirection was a material error and calculated to and did injure the rights of the Defendant.

2.

Because the Court misdirected the jury as to the law in this case, in that the Court failed to instruct the jury in its main charge to the jury upon the Defendant's right to protect his wife and his two daughters who were in

his home and on the premises at the time of the alleged difficulty, under the terms and provisions of Article 9.33 of the Penal Code of Texas, which misdirection was a material error and calculated to injure and did injure the rights of the Defendant.

3.

Because the Court misdirected the jury as to the law in this case, in that the Court committed fundamental error in submitting to the jury the law covering the offense of voluntary manslaughter, in that no evidence was introduced to raise such issue, either by the State of Texas or by the Defendant, there being no evidence on the part of either the State or the defense to show that the offense was committed under a sudden influence or passion arising from adequate cause, and such instruction to the jury was and is wholly unsupported by the evidence in the case, which misdirection was a fundamental error, calculated to and did injure the rights of the Defendant.

4.

Because the Court misdirected the jury as to the law in this case, in that the Court committed material and fundamental error in giving to the jury an instruction as to the law involving the offense of voluntary manslaughter, in that the evidence was wholly insufficient to raise such issue or to cause such issue to be submitted to the jury, and the submission of same to the jury deprived this Defendant of equal protection and due process of law, in violation of Amendment XIV of the Constitution of the United States, and Article I, Section 10 of the Constitution of Texas, and of a fair and impartial trial, as guaranteed by Amendment VI of the Constitution of the United States, which misdirection was a material and fundamental error and calculated to and did injure the rights of the Defendant.

5.

Because the Court committed material error calculated to injure and did injure the rights of the Defendant, in this, to wit: after the Court's main charge had been read to the jury by the Court on the guilt-innocence phase of the trial, and after the opening arguments by the State and the Defendant had been made to the jury, and before a verdict had been rendered or the jury finally discharged, the Court, of its own motion and without the consent of the Defendant, permitted the jury to separate without being in charge of a bailiff or escorted by an officer, in violation of the terms and provisions of Article 35.23 V.A.C.C.P. of Texas.

6.

Because the Court committed material error calculated to injure and did injure the rights of the Defendant, in violation of Article 35.23, V.A.C.C.P. of Texas, in that: after the opening arguments had been made by the State and the defense on the guilt-innocence phase of the trial, the Court over the timely objections of the Defendant, permitted the jury to separate before a verdict had been rendered or the jury had been finally discharged, without the consent of the Defendant, and such actions of the Court at that time and the Court's conduct at the conclusion of the trial in its self-examination of the jurors being unauthorized in law, placed the Defendant at a disadvantage under the laws of the State of Texas as to his right to make his own investigation as to the conduct of the jury after the trial was concluded and made it impossible for him to do so, and caused the jurors to be reluctant at a later date to reveal matters contrary to those brought out by the Court as to what actually happened during said unauthorized separation and during the jury's deliberations. In support hereof this Defendant attaches hereto the affidavit of G.C. Harris, one of his counsel, which is marked Exhibit A, and is made a part hereof, as fully

as though copied herein.

7.

Because the Court committed material error calculated to injure and did injure the rights of the Defendant, in permitting the jury the separate during the course of the trial, without the consent of the Defendant and without being escorted by the bailiff or officer during such separation, in violation of Article 35.23, V.A.C.C.P. of Texas, which action of the Court denied to the Defendant a fair and impartial trial, as guaranteed by Amendment VI of the Constitution of the United States, and further made applicable to the State of Texas under the 13th and 14th Amendments to the Constitution of the United States.

8.

Because the Court committed prejudicial and fundamental error calculated to injure and did injure the rights of the Defendant in this case, in that after the verdict on the punishment phase of the trial was finally received by the Court, and the jurors were polled, and said verdict was accepted, and after the jury had completed its work in connection with the trial of this case and should have by law been discharged and permitted to go its way, the Court of its own motion sequestered the jury and instructed them to go back into the jury room, and the Court thereafter had the jurors called back into the Courtroom one at a time, placed each juror under oath to tell the truth, and proceeded to question each juror as to his or her conduct and activity during the time they were permitted to separate after the Court's charge on the guilt-innocence phase of the trial has been read to the jury. without the Defendant's consent and without being escorted by an officer and at a time before the verdict on guilt or innocence had been returned by the jury, and all of such actions and questioning on the part of the Court being done over the timely objections of the Defendant,

and the Court during the questioning of the jurors separately asked questions of a leading and suggestive nature and to one or more of the jurors stated that any violation of the Court's instructions would make the juror subject to be held in contempt of the Court, which actions on the part of the Court and statements made to the jurors, in such unusual, unauthorized and extraordinary proceeding, conducted at the time and place and in the manner in which it was conducted, resulted in prejudice to the Defendant and foreclosed and prevented the Defendant in ascertaining facts concerning the conduct, actions and discussions of the jurors during their deliberations and during such unlawful separation of the jury, and denied to the Defendant a fair and impartial trial, as guaranteed by Amendment VI of the Constitution of the United States.

9.

Because William Lanford Brewer, one of the jurors who tried this case and joined in the rendition of said verdict, has been guilty of improper conduct and conduct unbecoming a juror in relation to said case and verdict, to wit: on Friday following the return of the verdict of guilty of voluntary manslaughter and assessing a penalty of fifteen years, the foreman of the jury, the said William Lanford Brewer, called Wesley Farmer, District Clerk of Fannin County, Texas, who was on duty during the entire trial of this case, and made certain statements to the said Wesley Farmer over the telephone, as more fully shown by the affidavit of the said Wesley Farmer attached hereto, marked Exhibit B, and made a part hereof, to which reference is here made as fully as though copied herein.

10.

Because the Court misdirected the jury as to the law in this case, in that in the last paragraph of the Court's main charge to the jury on the guilt-innocence phase of

the case, the jury was instructed, "**After you have reached a unanimous verdict and the Foreman has certified thereto***", which instruction made it mandatory that the jury return a unanimous verdict, when in truth and in fact and in law the jury was not compelled to reach any verdict at all, and such misdirection and instruction amounted to fundamental error on the part of the Court, calculated to and did injure the rights of the Defendant and deprived this Defendant of a fair and impartial trial, as guaranteed by Amendment VI of the Constitution of the United States and of equal protection of the law and due process of law, as guaranteed by Amendment XIV of the Constitution of the United States.

11.

Because the Court misdirected the jury as to the law in this case, in that in the Court's charge on punishment, the jury was instructed, "Your verdict must be unanimous", which instruction made it mandatory that the jury return a unanimous verdict, when in truth and in fact and in law the jury was not compelled to reach any verdict at all, and such instruction and misdirection amounted to fundamental error on the part of the Court, calculated to and did injure the rights of the Defendant and deprived this Defendant of a fair and impartial trial, as guaranteed by Amendment VI of the Constitution of the United States and of equal protection of the law and due process of law, as guaranteed by Amendment XIV of the Constitution of the United States.

12.

Because the Court committed material error calculated to and did injure the Defendant, in this; after the Court had received the verdict of the jury on punishment and the Court had polled the jury, the Court instructed the jury to retire to the jury room, and thereafter the juror, Tommy Thompson, was questioned by the Court, as follows:

"Q. I am going to ask you some questions now about what happened during that recess. You, under

law, have a right to refuse to answer on the ground that your answers might tend to incriminate you because, of course, if you did in any way violate the Court's instructions to not talk to anyone about the case and to not to talk to certain other about anything you could be punished for contempt. So you do have the right against self-incrimination if you choose to exercise it. Do you understand?

"A. Yes, sir."

13.

Because the Court committed material error calculated to and did injure the Defendant, in this: after the Court had received the verdict of the jury on punishment, and the Court had polled the jury, the Court instructed the jury to retire to the jury room, and thereafter the juror, James E. Ramey, was questioned by the Court, as follows:

"Q. I am going to ask you some questions about what you did during that recess, as I am asking the other jurors.

You have the right to refuse to answer on the ground that your answer might tend to incriminate you. If you violated any of the Court's instructions of course, you might be subject to being held in contempt of Court. So you do have the right of self-incrimination.

Are you willing to testify as to this matter?

"A. I am."

14.

Because the Court committed material error calculated to and did injure the Defendant in this: after the Court

had received the verdict of the jury on punishment, and the Court had polled the jury, the Court instructed the jury to retire to the jury room, and thereafter the juror, Mrs. Dorothy Stroud, was questioned by the Court, as follows:

"Q. **I am going to ask you some questions about what happened during that recess and, of course, you have the right to refuse to answer on the grounds that your answers might tend to incriminate you --

***

"THE COURT: Mr. Morris, as County Attorney for this County, do you grant the witness immunity from prosecution for anything that occurred?

MR.MORRIS: I do not, Your Honor."

WHEREFORE, Defendant moves and prays the Court that the verdict of the jury herein and the judgment of the Court rendered thereon be in all things set aside and held for naught, and that Defendant be granted a new trial herein.

BUSTER COLE
and
G.C. HARRIS

By /s/ G.C. Harris
ATTORNEYS FOR DEFENDANT
SAM McDONALD

THE STATE OF TEXAS)
COUNTY OF FANNIN)

EXHIBIT A

BEFORE ME, the undersigned authority, on this day personally appeared G.C. HARRIS, who after being by me duly sworn, states under oath as follows:

My name is G.C. Harris. I reside in Greenville, Texas and am duly licensed to practice law in the State of Texas. I maintain offices at 2403 Stonewall Street in the City of Greenville, Texas, and have been engaged in the practice of law for many years.

I, together with Buster Cole, attorney at law of Bonham, Texas, participated in the defense of Sam McDonald, in Cause No. 15862. styled The State of Texas v. Sam McDonald, in the District Court, 6th Judicial District, Fannin County, Texas, which case went to trial on April 18, 1977, in Bonham, Texas. After the evidence was concluded and both sides had closed on the guilt-innocence phase of the trial, the Court prepared his charge to the jury and submitted same to counsel for both sides for examination. In due time the Court read the charge to the jury, and after the County Attorney had made his opening speech for the State to the jury, followed by Buster Cole, with his opening speech for the Defendant to the Jury, the Court, of its own motion and without the consent of the Defendant, permitted the jury to separate, unescorted by an officer. In due time the jury reassembled and the arguments were concluded, and the jury retired to the jury room for its deliberations and returned a verdict of guilty on the guilt-innocence phase of the case. They were discharged and instructed to come back to court the following day, which was Thursday,April 21,1977.

After hearing on the punishment phase of the trial on the 21st day of April, 1977 and after the Court instructed the jury as to punishment, the jury retired to the jury room and returned a verdict, finding the

defendant guilty of voluntary manslaughter and assessed a penalty of 15 years in the Texas Department of Corrections.

Since the discharge of the jury, I, as one of the attorneys for the Defendant in the case, have contacted each member of the jury, in an effort to learn something of the discussions had in the jury room, while the jury was deliberating upon its verdicts, or while separated, as aforesaid, and each and every juror stated that he or she would not discuss with me the discussions that went on in the jury room during their deliberations, on either the guilt-innocence phase or the punishment phase of the case, and that such juror would not discuss with me what he or she saw or observed or discussed with others during the separation of the jury permitted by the Court, and that such juror would not give me an affidavit concerning such matters.

I sought such information from each juror as an attorney for the Defendant for the purpose of discovering on behalf of the Defendant whether or not there was jury misconduct or whether or not matters outside the record and outside the evidence which had been admitted in the case had been discussed by the jury, or any member of the jury, during their deliberations.

It is my belief, based on my contacts with the jurors, and each of them, that the action and conduct of the Court, in requiring the appearance of each juror for questioning by the Court, after the jury had completed its work and returned its verdict in the case, caused and made the jurors, and each of them, reluctant and fearful of talking to Defendant's counsel. It is my further opinion that the action and conduct of the Court, after the jury had returned its verdict and finished its work, in calling the jurors to the witness stand separately, placing them under oath,questioning them, with admonition by the Court to one or more of the jurors that such juror could refuse to answer the questions propounded by the Court on the ground that his or her answers might

incriminate such juror, and telling the juror that he or she might be held in contempt of the Court, placed such jurors, and each of them, is such a frame of mind as to be reluctant, hesitant and fearful of talking to Defendant's counsel.

Witness my hand, this the 7th day of July, 1977.

/s/ G.C. Harris

G.C. Harris

SUBSCRIBED AND SWORN TO BEFORE ME, by G.C. Harris, this the 7th day of July, 1977, to certify which witness my hand and seal of office.

/s/ Nell Johnston

Nell Johnston, Notary Public in and for Hunt County, Texas

THE STATE OF TEXAS)
COUNTY OF FANNIN)

EXIBIT B

BEFORE ME, the undersigned Notary Public in and for Fannin County, Texas, on this day personally appeared WESLEY FARMER, who being by me duly sworn, states under oath:

I am the duly elected, qualified and acting District Clerk of Fannin County, Texas, and was acting in such capacity and have been such official for many years. I was on duty as said Clerk of the Court when the case of the State of Texas v. Sam McDonald was tried during the month of April, 1977. The jury returned its verdict assessing fifteen years against the Defendant, on Thursday, April 21, 1977.

Thereafter on the 22nd day of April, 1977, at about 5:45 p.m., Mr. William Lanford Brewer, the foreman of the jury in the above case, called me at my home and said, "Mr. Farmer, why didn't you all send Sam McDonald to the pen this morning? We sentenced him yesterday to fifteen years in the pen. You all told us we had the last say."

I said, "Mr. Brewer, you say you all. I did not tell you anything for I had nothing to say to the jury."

Mr. Brewer said, "I just found out that McDonald went back to work in Sherman this morning. What is going on in this case?"

I said, "Mr. Brewer, by the way, I heard it too."

Again he said, "What are you all trying to do in this case?"

I said, "Mr. Brewer, you should not say you all, as I told you before, I had nothing to say in the case."

He said, "You all paraded Choice Moore, an old Mason, and Roy Doyle and Tom McDonald and others to swear to the character of Mr. Sam McDonald."

I said, "By the way Mr. Brewer, I am a Mason."

He said, "I know it, and so is Buster Cole, and I do

not know about the other lawyer. We were not trying Sam McDonald's character. We were trying him for killing a man. There is something fishy about the whole thing for you all told us we had the last say, and now why don't you send him, like you all said."

I said, "Mr. Brewer, again I say don't say you all, for again I say I have nothing to do with the case."

He said, "We prayed after every vote we took, what do you think about that?"

He said, "You all are making fools and liars out of the jury."

I said, "Mr. Brewer, I say again I had nothing to do with the case or the jury."

He said, "Then the Judge declared a recess for ten minutes so we could call home for we would be a little late getting home and go to the District Clerk's office to phone, but their phone was busy and I went in John Morris' office and called my wife, and he kept us out about thirty minutes."

Mr. Brewer said, "I was elected as foreman of the jury by a unanimous vote, and all of the members of the jury called me today and are mad at me for telling them that Sam McDonald would be sent to the pen the next day if we sentenced him to fifteen years. I still want to know what is happening."

I said, "Mr. Brewer, if you will call Judge Braswell at 784-4897, he can set you straight on all these questions."

Mr. Brewer said, "No, I won't call him because he made me mad when he asked me what I said to my wife. I don't like that a little bit. Well, there is not any use for me to keep talking to you for you are not going to tell me anything. Don't be mad at me."

I said, "I am not mad. I am sorry I cannot answer your questions."

The Mr. Brewer I have referred to above was the foreman of the jury.

WITNESS MY HAND THIS THE 7TH DAY OF JULY, 1977.

/s/ Wesley Farmer

WESLEY FARMER

SUBSCRIBED AND SWORN TO BEFORE ME by WESLEY FARMER, this the 7th day of July, 1977, to certify which witness my hand and seal of office.

SHARRON BURKS

/s/ Sharron Burks

Notary Public in and for Fannin County, Texas

STATE OF TEXAS)
COUNTY OF FANNIN)

I, SAM McDONALD, Defendant in the above entitled and numbered cause, do solemnly swear that the facts and statements set forth in the above and foregoing Amended Motion for New Trial, are true and correct, to the best of my knowledge.

/s/ Sam McDonald

Sam McDonald
Defendant

SWORN TO AND SUBSCRIBED BEFORE ME, by Sam McDonald, Defendant in the above entitled and numbered cause, this the 7th day of July, 1977, to certify which witness my hand and seal of office.

SHARRON BURKS

/s/ Sharron Burks

Notary Public in and for Fannin County, Texas

CERTIFICATE OF DELIVERY

Copy of the above and foregoing Amended Motion for New Trial was delivered to the office of Mr. John Morris, County Attorney of Fannin County, Texas, in the Courthouse in Bonham, Texas,on this the 7th day of July, 1977.

/s/Buster Cole

Of Counsel for Defendant

APPENDIX E

THIRD GROUND OF ERROR (Restated)

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE JURY TO SEPARATE DURING THE TRIAL AND BEFORE A VERDICT WAS REACHED, WITHOUT THE CONSENT OF THE APPELLANT, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS UNDER THE 6TH AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND VERNON'S ANN. C.C.P. ARTICLE 35.23 (R 138, 139)

FOURTH GROUND OF ERROR (Restated)

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SEPARATELY QUESTIONING EACH MEMBER OF THE JURY UNDER OATH AFTER THE COURT HAD RECEIVED AND ACCEPTED THE VERDICT OF THE JURY ASSESSING PUNISHMENT IN THE CASE. (R 139, 140)

STATEMENT

The Third and Fourth Grounds of Error are grouped for the purpose of brevity and because they relate to the same matter.

After the charge on guilt-innocence phase of the trial had been read to the jury, and after the County Attorney for the State and Buster Cole for the Appellant had made their opening arguments to the jury, the Trial Court announced to the jury that before continuing with final arguments, he was going to give them a brief recess so that if they desired to call home and notify anybody at home at home that they might be late getting home, they could do so, and that they might use the phone in the District Clerk's office at the end of the hall and to return to the Courtroom in five minutes, all of which was without the consent of the Appellant, and the Court, on its own motion, separated the jury.

APPENDIX F

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas, Apr. 30, 1980

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave To File" the Appellant's Motion for Rehearing in Cause No. 58,823, Sam McDonald

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours, Thomas Lowe
Clerk

Supreme Court, U. S.
FILED
OCT 28 1980
MICHAEL RODAK, JR., CLERK

NO. 80-50

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

SAM MILLER McDONALD
Petitioner

V.

THE STATE OF TEXAS,
Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

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Attorneys for Respondent

QUESTION PRESENTED

I. Whether Petitioner was denied a fair trial and due process of law by the trial court's action, after conclusion of the trial, in questioning the jurors individually in an attempt to ascertain whether Petitioner was harmed when the trial court allowed the jury to separate after the charge had been delivered.

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NO. 80-50

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SAM MILLER McDONALD,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES The State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the petition for writ of certiorari submits this Brief in Opposition.

OPINION BELOW

Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals on March 19, 1980. *McDonald v. State,* ____ S.W.2d ____ (No. 58,823). The opinion is reproduced as Appendix A to the Petition.

JURISDICTION

Petitioner correctly seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner's claims are based on the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Respondent is in substantial agreement with Petitioner's statement of the case. However, Respondent cannot agree with Petitioner's statement that all initial questions at the post-trial hearing propounded by the trial judge were posed with an eye towards showing that no harm resulted from the separation of the jury. Respondent would further point out that Petitioner failed to object when the trial judge informed the first two juror-witnesses that they could be held in contempt of court if their testimony revealed that improper discussion of the case was had during the separation.

Respondent also wishes to advise this Court that on May 21, 1980, Petitioner filed an application for writ of habeas corpus in the United States District Court for the Eastern District of Texas, Paris Division. *McDonald v. Estelle*, Civil Action No. P-80-18-CA. A copy of that petition is attached to this Brief as Appendix A.

SUMMARY OF ARGUMENT

There are no special and important reasons to consider the issues presented.

This Court should refrain from acting on the Petition for Writ of Certiorari pending disposition of Petitioner's application for writ of habeas corpus in the United States District Court.

Petitioner has not presented the precise issue raised herein to the Texas Court of Criminal Appeals, and therefore this Court is without jurisdiction to grant the writ of certiorari.

The post-trial hearing of which Petitioner complains did not deny him due process of law or his right to a fair trial, and he was in no way harmed thereby.

ARGUMENT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reasons in this case, and none exists.

II.

THIS COURT SHOULD REFRAIN FROM ACTING ON THE PETITION FOR WRIT OF CERTIORARI IN ORDER TO ALLOW PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS IN THE UNITED STATES DISTRICT COURT TO PROCEED IN AN ORDERLY FASHION.

Petitioner's application for writ of habeas corpus was filed in the United States District Court for the Eastern District of Texas, Paris Division, on May 21, 1980. The Petition for Writ of Certiorari was filed in this Court on June 19, 1980. Under the statutes governing applications for federal writ of habeas corpus, this Court may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it. 28 U.S.C. §2241(b). It is therefore proper, Respondent submits, for this Court to refrain from acting on the Petition pending the orderly disposition of the application for writ of habeas corpus in the federal district court.

III.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER PETITIONER'S CLAIM BECAUSE IT WAS NOT PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

Petitioner contends that he was denied a fair trial and due process of law by the court's conduct of a post-trial hearing to determine whether Petitioner had been harmed by the separation of the jury without his consent. This contention was not presented to the Texas Court of Criminal Appeals in Petitioner's appeal of his conviction. The grounds of error asserted by Petitioner in his appellate brief relevant to the separation of the

jury and the post-trial hearing are reproduced as Appendix E to the Petition. Petitioner complained that the post-trial hearing constituted reversible error, but did not allege that this procedure deprived him of a fair trial or denied him due process of law.

The cases are legion that this Court cannot decide issues raised for the first time on petition for writ of certiorari or on appeal and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long standing nature of the rule: "[I]n *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." *Cardinale v. Louisiana, supra*, at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919).

Respondent submits that in view of Petitioner's failure to raise the issue presented here below, the failure of the state court to pass on this issue, the desirability of giving the state the first opportunity to address the issue, and the fact that a federal habeas remedy may remain if no state procedure for raising the issue is available to Petitioner, the application for certiorari should be denied for want of jurisdiction. *Cardinale v. Louisiana, supra*, at 439.

IV.

PETITIONER WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL OR DUE PROCESS OF LAW BY THE PROCEDURE EMPLOYED BY THE TRIAL COURT.

Petitioner's contention that he was denied a fair trial and due process of law by the trial court's conduct of the post-trial hearing fails to raise a constitutional claim worthy of this Court's consideration. The opinion of the Texas Court of Criminal Appeals, which is reproduced as Appendix A to the Petition, fully discussed this contention and found it to be without merit.

Even though the separation of the jury was without Petitioner's consent, and therefore in violation of Article 35.23 of the Texas Code of Criminal Procedure, Petitioner was not harmed thereby. Neither was Petitioner harmed by the post-trial hearing of which he complains. As stated by the Court of Criminal Appeals and conceded by Petitioner, there is no specific statutory procedure for the State to meet its burden of showing that Petitioner was not harmed by the separation of the jury. Even if the hearing had been in violation of Texas procedural rules, which it was not, matters of state procedure are not reviewable in a federal forum absent a denial of fundamental fairness. *Forbes v. Estelle*, 559 F.2d 967 (5th Cir. 1977); *Nichols v. Estelle*, 556 F.2d 1330 (5th Cir. 1977); *Willeford v. Estelle*, 538 F.2d 1194 (5th Cir. 1976).

Neither the holding of the post-trial hearing nor the manner in which it was conducted caused Petitioner to suffer the deprivation of any constitutionally protected right. The State was entitled to an opportunity to rebut the presumption of harm arising from the separation of the jury without Petitioner's consent, and it is of no consequence that the trial judge conducted the initial questioning of the jurors. The trial court stated prior to the hearing that it would allow both the prosecutor and

defense counsel to question the jurors, and Petitioner's attorney fully availed himself of the opportunity. Examination of the questions propounded by the trial judge belies Petitioner's assertion that they were "posed with an eye toward showing that no harm resulted . . ." (Petition, p. 9). Petitioner's actual complaint appears to be that he was unable to demonstrate that he was prejudiced by the separation of the jury. Petitioner is unable to do so, Respondent submits, for an obvious reason: nothing prejudicial to Petitioner's rights occurred during the jury recess. The authorities cited by Petitioner which disapprove a person serving in the dual role of prosecutor and judge are simply inapplicable to the facts of this case.

Petitioner also complains that the trial judge warned the first three jurors prior to questioning them that they could be held in contempt of court if their testimony revealed any improper discussion of the case. As observed by the Court of Criminal Appeals, appellant failed to object to the first two jurors being so warned, thereby waiving any claim as to them. *Wainwright v. Sykes*, 433 U.S. 72 (1977). The Court of Criminal Appeals found that under the circumstances, no reversible error was presented. Petitioner has not shown that he was harmed by these questions; to presume harm under these circumstances would be to engage in speculation.

Finally, Petitioner urges that the questions propounded by the trial court prevented defense counsel from interviewing the jurors in regard to possible misconduct. Petitioner has not demonstrated any causal relationship between the post-trial hearing and the reluctance of the jurors to discuss their deliberations, and Respondent submits that none exists. The jurors were entitled not to discuss their deliberations, as stated by the Court of Criminal Appeals, and their exercise of this privilege has not been shown to have harmed Petitioner in any way.

Whether Petitioner was prejudiced by the jurors' unwillingness to discuss their deliberations is a factual issue which does not, by itself, justify the exercise of this Court's certiorari jurisdiction. *Tacon v. Arizona, supra,* at 352; *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

CONCLUSION

For the above reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

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Attorneys for Respondent

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

SAM MCDONALD,	§	
	§	
Petitioner	§	
	§	
VS.	§	
	§	
W. J. ESTELLE, DIRECTOR OF PRISONS OF THE STATE OF TEXAS, AND, MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS,	§	No. P-80-18-CA
	§	
Respondents	§	

PETITION FOR WRIT OF HABEAS CORPUS

1. Name and location of court which entered the judgment of conviction under attack is the 6th Judicial District Court of Fannin County, Texas.

2. Date of judgment of conviction is May 6, 1977.

3. Length of sentence is 15 years, without probation.

4. Nature of offense involved is voluntary manslaughter.

5. Plea was not guilty.

6. A jury trial was held.

7. Petitioner testified at the trial.

8. Petitioner appealed from the judgment of conviction.

9. Petitioner appealed to the Court of Criminal

of the State of Texas. The conviction was affirmed by the Court of Criminal Appeals on March 19, 1980, and Application for Re-Hearing was denied on April 30, 1980. Thereafter, the Petitioner filed an Application for Stay of execution of the state court sentence in the Texas Court of Criminal Appeals on May 5, 1980, and that was denied thereby on May 7, 1980. Thereafter, the Petitioner on May 7, 1980, filed a similar Application for Stay in the Supreme court of the United States, and same was denied thereby on May 9, 1980. The Petitioner intends to timely file his Application for Writ of Certiorari in the Supreme Court of the United States.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Answer: Yes.

11. If your answer to 10 was "yes," give the following information:

(a)(1) Name of Court: Texas Court of Criminal Appeals for the State of Texas.

(2) Nature of proceeding: Motion for Rehearing.

(3) Grounds raised: See the attached Exhibit "A."

(4) Did you receive an evidentiary hearing on your petition, application or motion? Answer: No.

(5) Result: Application denied.

(6) Date of Result: April 28, 1980.

(b)(1) Name of Court: Court of Criminal Appeals for the State of Texas.

(2) Nature of proceeding: Application for Stay.

(3) Grounds raised: that execution of the state court sentence should be stayed pending filing Writ of Certiorari to the Supreme Court of the United States.

See the attached Exhibit "B."

(4) Did you receive an evidentiary hearing on your petition, application or motion? Answer: No.

(5) Result: Application denied.

(6) Date of result: May 7, 1980.

(c) As to any second petition, application or motion, give the same information:

(1) Name of court: Supreme Court of the United States.

(2) Nature of proceeding: Application for Writ of Stay.

(3) Grounds raised: Same as in the Application to the Texas Court of Criminal Appeals, including the hearing difficulties of the Petitioner would make preparation of the Application for Writ of Certiorari difficult, if not almost impossible. See the attached Exhibit "C."

(4) Did you receive an evidentiary hearing on your petition, application or motion? Answer: No.

(5) Result. Application denied.

(6) Date of result: May 7, 1980.

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion? Answer: Yes. See above.

12. A. **Ground one**: Petitioner was deprived by his conviction of liberty without due process of law, and in violation of equal protection of law.

Supporting facts: It is uncontroverted, as was so testified to during Petitioner's trial, that the petitioner suffers from an eighty (80%) per cent to ninety (90%) per cent total hearing loss, even with the use of a powerful

hearing aid, being the strongest available to the Petitioner anywhere. See the attached Exhibit "D." The trial was conducted without any amplification of witnesses', judge's, and/or counsels' voices, nor were there any means provided for the Petitioner to communicate with his counsel during trial. The above-described hearing loss is increased during times of tension and crisis that the Petitioner is encountering, and the trial of this cause further reduced the hearing capabilities of the Petitioner because of the tension that he had during the trial. Therefore, because of the above, the Petitioner could not hear the voir dire of the jury, the statements, admonishments, and/or ruling of the court, the arguments and/or objections of counsel, and could only hear no more than isolated words testified to by two of the many witnesses presented against him at his trial, motion for new trial, and/or sentencing.

B. **Ground two**: The conviction was obtained in violation of the Petitioner's right to confront the witnesses against him.

Supporting facts: It is uncontroverted, as was so testified to during Petitioner's trial, that the Petitioner suffers from an eighty (80%) per cent to ninety (90%) per cent total hearing loss, even with the use of a powerful hearing aid, being the strongest available to the Petitioner anywhere. See the attached Exhibit "D." The trial was conducted without any amplification of witnesses', judge's, and/or counsels' voices, nor were there any means provided for the petitioner to communicate with his counsel during trial. The above-described hearing loss is increased during times of tension and crisis that the Petitioner is encountering, and the trial of this cause further reduced the hearing capabilities of the Petitioner because of the tension that he had during the trial. Therefore, because of the above, the Petitioner could not hear the voir dire of the jury, the statements, admonishments, and/or rulings of the court, the arguments and/or objections of counsel, and could

only hear no more than isolated words testified to by two of the many witnesses presented against him at his trial, motion for new trial, and/or sentencing.

C. **Ground three**: The conviction was obtained by the Petitioner's failing to receive a fair and impartial trial of his case.

Supporting facts: It is uncontroverted, as was so testified to during Petitioner's trial, that the Petitioner suffers from an eighty (80%) per cent to ninety (90%) per cent total hearing loss, even with the use of a powerful hearing aid, being the strongest available to the Petitioner anywhere. See the attached Exhibit "D." The trial was conducted without any amplification of witnesses', judge's, and/or counsels' voices, nor were there any means provided for the Petitioner to communicate with his counsel during trial. The above-described hearing loss is increased during times of tension and crisis that the Petitioner is encountering, and the trial of this cause further reduced the hearing capabilities of the Petitioner because of the tension that he had during the trial. Therefore, because of the above, the Petitioner could not hear the voir dire of the jury, the statements, admonishments, and/or rulings of the court, the arguments and/or objections of counsel, and could only hear no more than isolated words testified to by two of the many witnesses presented against him at his trial, motion for new trial, and/or sentencing.

D. **Ground four**: Because of Petitioner's hearing impairment, and his inability to communicate with counsel during trial, the Petitioner, because of his said physical disability, could not exercise his full right to assistance of counsel for his defense.

Supporting facts: It is uncontroverted, as was so testified to during Petitioner's trial, that the Petitioner suffers from an eighty (80%) per cent to ninety (90%) per cent total hearing loss, even with the use of a powerful hearing aid, being the strongest available to the

Petitioner anywhere. See the attached Exhibit "D." The trial was conducted without any amplification of witnesses', judge's, and/or counsels' voices, nor were there any means provided for the Petitioner to communicate with his counsel during trial. The above-described hearing loss is increased during the times of tension and crisis that the Petitioner is encountering, and the trial of this cause further reduced the hearing capabilities of the Petitioner because of the tension that he had during the trial. Therefore, because of the above, the Petitioner could not hear the voir dire of the jury, the statements, admonishments, and/or rulings of the court, the arguments and/or objections of counsel, and could only hear no more than isolated words testified to by two of the many witnesses presented against him at his trial, motion for new trial, and/or sentencing.

E. **Ground five**: Conviction of the Petitioner on the charge of the Court was a denial of due process, equal protection of the laws and his right to a fair and impartial trial. In addition, or in the alternative, the refusal of the trial court to submit Petitioner's requested issues and the ultimate conviction of Petitioner was a denial of due process and his right to a fair and impartial trial. In the alternative, the laws of the State of Texas, with regard to defense of a habitation, and the resulting convictions of Petitioner thereunder was a denial of due process and equal protection of the law, and his right to a fair and impartial trial.

Supporting facts: The Petitioner, at the time being 52 years of age, the father of five children, weight 145 lbs., with approximately eighty to ninety per cent hearing loss, and with restricted use of his right leg, a metal plate between his hip and knee holding the leg bones together, which he had been wearing for a number of years, on the date alleged in the indictment lived at 902 Lynn Street, Bonham, Fannin County, Texas, with his wife and two minor daughters. The deceased, R.N. Hartline, was 39 years of age and was a well-developed man of six feet, or just over, and weighed

170 to 180 lbs. On December 12, 1976, a Sunday, about 3:30 p.m., when Petitioner was in the kitchen of his home working on some papers, his wife told him someone wanted to see him at the front door. Petitioner went outside the front door and saw a man, whom he did not recognize, and who identified himself as R.N. Hartline. Hartline wanted Petitioner to sign a release of a Deed of Trust lien on property previously sold by the Petitioner and his wife in 1972 to the said R.N. Hartline and wife. Petitioner, after looking at it, told Hartline that he, the Petitioner, would want to check with his attorney regarding it. Hartline told Petitioner, "I want the paper signed, and I want to take it back with me." Petitioner left Hartline in the front yard and went into his house, tried to call his attorney, failed to reach him, and returned to the outside of his house where Hartline was still waiting. Petitioner told Hartline that he was unable to reach his attorney, and that if Hartline would leave the paper with Petitioner until Friday of that week, Petitioner would contact his attorney and get him to look it over. Hartline insisted that he wanted the paper signed, and was going to take it back with him that day. Petitioner told Hartline that he would not sign the paer until he sought legal advice. Petitioner turned to go into his house. He went through the garage door and, Hartline, without any invitation from Petitioner, followed Petitioner into his kitchen, and to the surprise of Petitioner, said to Petitioner, "You are going to sign that paper or wish you had," and at that time he had a butcher knife in his hand which Hartline had picked up from the counter of Petitioner's kitchen in his home and was coming toward Petitioner. Petitioner backed up against the wall of his kitchen, and reached into the utility pantry in the kitchen with his right hand and retrieved a gun, which he raised and fired, at a time when he was in fear for his life, was acting in self-defense, and Hartline had in his hand a deadly weapon, and was coming toward the Petitioner. Attached hereto as Exhibit "E" are portions of records of said trial proceedings, being pages 460 and 461, which are

incorporated herein for all purposes.

F. **Ground six.** Conviction was obtained in violation of Petitioner's rights to equal protection and due process of law because of the actions of the trial court and the resulting effect thereof upon the jury.

Supporting facts: After the charge on guilt-innocence phase of the trial had been read to the jury, and after the County Attorney for the State and Buster Cole for the Petitioner had made their opening arguments to the jury, the Trial Court announced to the jury that before continuing with final arguments, he was going to give them a brief recess so that if they desired to call home and notify anybody at home that they might be late getting home, they could do so, and that they might use the phone in the District Clerk's office at the end of the hall and return to the Courtroom in five minutes, all of which was without the consent of the Petitioner, and the Court, on its own motion, separated the jury.

The Record shows that the separation of the jury took place on the second floor of the courthouse in Bonham, and outside the courtroom. That the length of time the jurors were out of the courtroom varied from five minutes to about thirty minutes, and that the number of people standing around in the hall varied from a few to as many as fifty, including relatives and friends of the deceased, and that the jurors went into the various offices, including the County Attorney's office and the Justice of the Peace office during the recess.

Petitioner moved the court for a mistrial upon the ground that the Court permitted the jury to leave the courtroom without being accompanied by a bailiff and to go unescorted in violation of the Code of Criminal Procedure, which motion was by the Trial Court overruled, and Petitioner excepted.

Immediately after the jury had returned its verdict

assessing the punishment in this case, the Trial Court instructed the jury to go back to the jury room, and stated to counsel that on the Court's own motion he would "conduct an inquiry into the conduct of the jury during the five minute recess taken yesterday afternoon during final arguments on guilt or innocence."

The Trial Court undertook to and did question each juror separately, and in questioning at least two of the jurors, admonished them that if they had violated the Court's instructions the juror could be held in contempt of court and punished therefor. The effect of the trial court's action in this regard could only amount to harm and injury to the Petitioner in violation of his constitutional rights.

This conduct and action of the Trial Court was objected to by the Petitioner, for the reason that there was no provision in the law for the Court's so doing, that Petitioner was thereby denied an opportunity to make his own investigation, and upon the further ground that such action on the part of the Trial Court was injurious to the rights of the Petitioner, such inquiry was without authority in law, and once the jury had rendered its verdict, it was no longer under the control of the Trial Court but by law was discharged.

Further, that the action of the Trial Court in calling the jurors to testify separately and placing them under oath and questioning them, with admonition by the Trial court to one or more of the jurors, that such juror could refuse to answer the question propounded by the Trial Court on the ground that his or her answers might incriminate such juror and telling the juror that he or she might be held in contempt of court, placed such jurors, and each of them, in such a frame of mind as to be reluctant, hesitant, and fearful of talking to Petitioner's counsel, and rendered the hearing on the Petitioner's Amended Motion for New Trial a useless and futile effort of Petitioner to correct the errors of the trial court. Particularly, was this result effected, when, in the

presence of a juror under such inquiry, the District Attorney was asked by the Court if he granted immunity to the juror, he replied, "I do not...." Attached hereto as Exhibit "F" are portions of the record of the trial proceedings, being page 527-528, 533-534, 540, 572, and 625-643, which are incorporated herein for all purposes.

13. If any of the grounds listed in 12A, B, C, D, E, and F, were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

As to Grounds 12A, B, C, and D, these were not presented, except as a ground in the Motions for Stay, above-described.

Petitioner does not know why these were not previously presented, but they were first mentioned to Petitioner by his present attorney, Mr. Hefner, on or about May 5, 1980, which was shortly after Mr. Hefner became involved in Petitioner's case.

The grounds raised in 12E and F, were raised on the direct appeals, above-described.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? No, but Petitioner anticipates timely filing his Writ of Certiorari, above-described.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing, arraignment and plea, trial, sentencing, appeal to the Texas Court of Criminal Appeals, and Application for Rehearing before the Texas Court of Criminal Appeals:

Mr. G. C. Harris
Attorney at Law
2403 Stonewall Street
Greenville, Texas 75401

and

Mr. Buster Cole
Attorney at Law
310 North Center Street
Bonham, Texas 75418

(b) Application for Stay before Texas Court of Criminal Appeals and Application for Stay before United States Supreme Court:

Mr. Stephen F. Hefner
Attorney at Law
109 West Houston Street
Sherman, Texas 75090

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

No, Petitioner was convicted and sentenced on a lesser included offense to that charged in the indictment.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

No.

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

Executed at Bonham, Fannin County, Texas, on the *13th* day of May, 1980.

Respectfully submitted,

STEPHEN F. HEFNER &
ASSOCIATES
109 West Houston Street
Sherman, Texas 75090
(214) 892-1515

BY: /s/

Stephen F. Hefner

/s/

Sam McDonald, Petitioner

Supreme Court, U.S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

No. 80-50

In the Supreme Court of the United States
OCTOBER TERM, 1980

SAM MILLER McDONALD, PETITIONER

v.

THE STATE OF TEXAS, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF
CRIMINAL APPEALS

PETITIONER'S REPLY AND ANSWER TO RESPONDENT'S BRIEF IN OPPOSITION

STEPHEN F. HEFNER & ASSOCIATES
109 West Houston Street
Sherman, Texas 75090

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NO. 80-50

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SAM MILLER McDONALD,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of
Criminal Appeals

PETITIONER'S REPLY AND ANSWER TO RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW, Sam Miller McDonald, Petitioner herein, by and through his attorney, Stephen F. Hefner, and in reply and answer to Respondent's Brief in Opposition submits the following.

I.

SUMMARY OF ARGUMENT

There are special and important reasons to consider the issues presented.

The fact that Petitioner has applied for a Writ of Habeas Corpus should have no effect upon this Court's decision with regard to whether or not to grant Petitioner's Application for Writ of Certiorari.

Petitioner has presented the issue raised in his Petition to the Texas Court of Criminal Appeals, and, therefore, this Court has jurisdiction to grant the Writ of Certiorari requested.

The post-trial hearing of which the Petitioner complains did deny him due process of law and his right to a fair trial, and he was harmed by the hearing.

II.

ARGUMENT

A.

The Question Presented for Review is Worthy of This Court's Consideration

First, Petitioner would comment that the

correct rule that Respondent wishes to refer to is Rule 19 of the Rules of the Supreme Court, not Rule 17.

In his Petition, Petitioner discusses in detail the numerous reasons why his petition is worthy of the court's consideration. The two central reasons are listed as follows:

1. Petitioner was denied due process of law in the trial court's allowance of an unauthorized separation of the jury.

2. Petitioner was denied due process of law in the subsequent holding of a post-trial hearing by the court which was calculated to destroy Petitioner's ability to demonstrate the harm incurred by such jury separation.

It is uncontroverted that under the Code of Criminal Procedure of the State of Texas, and the decisions of the Court of Criminal Appeals of Texas, that where a separation of the jury occurs after the charge is given at the guilt-stage of the trial, a presumption of harm to the Defendant attaches, placing the burden on the prosecution

show that no injury resulted or could not have reasonably resulted from such separation. Skillern v. State, 559 S.W.2d 828, 830-32 (Tex.Crim. App. 1977); Goodall v. State, 501 S.W.2d 342, 343 (Tex.Crim.App. 1973). Further, it is uncontroverted that there is no special procedure under the Texas Code of Criminal Procedure by which the state may attempt to demonstrate that Defendant was not harmed by the separation of the jury.

What happened in this case was in complete contravention to the above two mentioned propositions. Of what use is a presumption of law if it has no force and effect? Further, how can a procedure, which is not given in the statutes or any court decision, simply be created out of thin air? The correct procedure that should have been followed in this case is discussed in detail in the Petition, at 13. Suffice it here to say that the correct procedure was not followed in the trial of this case.

B.

This Court is Under No Constraint Whatsoever to Refrain from Action on the Petition for Writ of

Certiorari in Order to Allow Petitioner's Application for Writ of Habeas Corpus in the United States District Court to Procede in an Orderly Manner

Petitioner vehemently objects to Respondent's wholly unsubstantiated contention that this court should refrain from acting on Petitioner's petition for Writ of Certiorari in order to allow Petitioner's Application For Writ of Habeas Corpus in the United States District Court to proceed in an orderly manner. Respondent is seeking, in an unfair way, to block all possible remedies open to Petitioner. First, Petitioner points out that in his Motion to Dismiss Petitioner's Writ of Habeas Corpus, a copy of which is incorporated herein as Appendix "A," Respondent states, as one ground for dismissal, that the court should not consider the Writ of Habeas Corpus until the Supreme Court of the United States has made a decision upon Petitioner's Writ of Certiorari. Respondent's Motion to Dismiss, Section VI. If the Court follows Respondent's suggestion, then this case could be left in a curious position. If the lower court delays

in granting Petitioner's Writ of Habeas Corpus until the Supreme Court of the United States makes a decision with respect to Petitioner's Writ of Certiorari, and if the Supreme Court of the United States decides to delay in making a decision with respect to Petitioner's Writ of Certiorari until Petitioner's Writ of Habeas Corpus has been disposed of, then this leaves Petitioner with no remedy whatsoever in any form. Respondent is clearly seeking inconsistent remedies in different forums, doing anything it can to block all avenues of relief open to Petitioner, while failing to give all forums the benefits of any precedents therefor. This is blatantly unfair to Petitioner, and would, in itself, amount to a denial of due process to the Petitioner, and Petitoner would again vehemently object to such tactics on the part of Respondent. Further, the proposition that this Court should refrain from acting on a Writ of Certiorari until a decision has been made with respect to a Writ of Habeas Corpus is a manufactured proposition of law by Respondent, having no support whatsoever in any case law in existence, and Respon-

dent cites to no case to support its contention. Further, for Respondent's elucidation, there is no Writ of Habeas Corpus on file with this Court, and, therefore, the provisions of 28 U.S.C. §2241 would not appear to be applicable to this proceeding.

The status of the law several years ago could be summarized by stating that before a Petition for Writ of Habeas Corpus could be considered by a Federal District Court, there had to be on file a petition for Writ of Certiorari to the United States Supreme Court. A good example is the case of Curtis v. Boeger, 331 F.2d 675 (8th Cir. 1964). In Curtis, appellants had filed petitions for writs of habeas corpus in federal district court. The petitions were denied on the grounds that appellants had failed to exhaust state remedies. The Eighth Circuit stated the issue as being "whether it was necessary for appellants to apply to the Supreme Court of the United States for Writ of Certiorari from the order of the Supreme Court of Missouri denying them relief, before they were entitled to a hearing in the United States

District Court upon the merits of their claims." Id., at 675-76. The Eighth Circuit addressed the issue as follows:

> "In his brief, appellee acknowledges that 'Fay v. Noia expressly obliterated the past procedural requirement of certiorari to the United States Supreme Court before consideration of habeas relief in the District Court' and suggests that this Court 'remand these cases to the District Court for further proceedings in consonance with the requirements of Townsend v. Sain, 372 U.S. 293 [83 S.Ct. 745, 9 L.Ed.2d 770].'
>
> Being now fully advised and informed in the premises, the Court determines that appellants were not, as a prerequisite to a hearing upon the merits of their application, required to petition the Supreme Court of the United States for writ of certiorari and further determines that they have exhausted their state remedies within the teachings of

Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837." Id., at 676. (Emphasis supplied).

Thus, due to the holding of the court in Fay v. Noia, 372 U.S. 391, there is no longer in existence the procedural requirement that there must be on file a petition for Writ of Certiorari to the Supreme Court before a Petition for Writ of Habeas Corpus can be considered. It, therefore, follows that a petition for habeas corpus should not be a bar to the consideration by this Court of an Application for Writ of Certiorari.

C.

Petitioner's Claim Was Presented to the Texas Court of Criminal Appeals

Respondent's contention that Petitioner did not present the question of whether he was denied a fair trial and due process of law to the Texas Court of Criminal Appeals is blatantly wrong. In Respondent's Brief, at 5, Respondent states as follows:

"Petitioner complained that the post-trial hearing constituted reversible

error, but did not allege that this procedure deprived him of a fair trial or denied him due process of law." Id.

First, the third ground of error advanced by Petitioner to the Texas Court of Criminal Appeals is stated as follows:

> "The trial court committed reversible error in permitting the jury to separate during the trial and before a verdict was reached, without the consent of the appellant, in violation of appellant's constitutional and statutory rights under the 6th and 14th amendments to the Constitution of the United States and Vernon's Ann. C.C.P. Article 35.23 (R. 138, 139)." Petitioner's Petition for Writ of Certiorari, Appendix E. (Emphasis supplied).

Second, Petitioner refers the Court to Appendix C of his Petition, containing excerpts from the official court reporter's transcription of trial. On page 15 of Appendix C, Petitioner's counsel stated that the hearing held by the Court

"is injurious and harmful to Defendant, Sam McDonald, and would be calculated to deprive him of a fair and impartial trial as guaranteed under the constitution and laws of the United States." Id. On Page 16 of Appendix C, Petitioner's counsel stated that the hearing held by the Court "is in violation of the Code of Criminal Procedure of the State of Texas and in violation of the Constitution of the United States of America, and particularly the Fourteenth Amendment thereof, which guarantees a man a fair and impartial trial . . . ." Id. Petitioner's counsel could not have been plainer in his language as to what he was objecting to. For Respondent to assert otherwise is simply an attempt on its part to cloud the true issues before this Court.

Third, Petitioner requests that the Court read the case of McDonald v. State, 597 S.W.2d 375 (C.C.A. 1980), a copy of which is provided as Appendix A of the Petition. Petitioner believes that once the Court has made a review of this case that it will agree that the Texas Court of Criminal Appeals thoroughly explored the questions of

whether Petitioner was denied his rights to a fair trial and due process of law.

Last, in Section IV of his argument, Respondent admits that the issue of whether Petitioner was denied his right to a fair trial and due process of law by the procedure employed by the trial court was fully discussed by the Texas Court of Criminal Appeals. Respondent states as follows:

> "Petitioner's contention that he was denied a fair trial and due process of law by the trial court's conduct of the post-trial hearing fails to raise a constitutional claim worthy of this Court's consideration. The opinion of the Texas Court of Criminal Appeals, which is reproduced as Appendix A of the Petition, fully discussed this contention and found it to be without merit." Respondent's Brief, at 6. (Emphasis supplied).

Therefore, Respondent's contention that Petitioner did not present the question of whether he was denied a fair trial and due process of law to

the Texas Court of Criminal Appeals is without merit, and should be given no consideration by the Court.

D.

Petitioner Was Denied His Right to a Fair Trial and Due Process of Law by the Post-Trial Hearing

The only answer given by Respondent to Petitioner's objection to the hearing is that "there is no specific statutory procedure for the State to meet its burden of showing that Petitioner was not harmed by the separation of the jury . . . ." Respondents Brief, at 6. While there is no special procedure under the Texas Criminal Procedure by which the state may attempt to demonstrate lack of harm in the separation of the jury, there is a procedure available through which the State may show lack of harm. Under the Texas Code of Criminal Procedure, "should a defendant's motion for new trial be overruled and a judgment of conviction delivered, the state's evidence regarding harm through separation of the jury would be heard upon the defendant's motion for new trial." Petition, at 13, citing Art. 40.03, Tex. Code Crim.

Proc. Ann. (1979). Thus, the State did have a procedure available through which it could show lack of harm. it simply shose to ignore it.

There are good reasons why rules of procedure exist. First, they place Defendants on fair notice as to how their trials are going to be handled. Second, they serve the higher purpose of protecting a defendant's due process rights. All defendant's have a right to rely on the rules of procedure to give them whatever protection the rules afford. The fact that there is no "special procedure" available, whereby the State could show that there was no harmful error in the court's allowing the separation of the jury, is the State's problem, to be remedied by the Texas Legislature. It should not be the problem of the Petitioner, although the Respondent in its Brief has chosen to make it so.

With respect to the contention that Defendant somehow waived his objections to the fact that the trial judge warned the first three jurors prior to questioning them that they could be held in contempt of court if their testimony revealed any im-

proper discussion of the case, Petitioner states that such an objection would be both superfluous and unnecessary. Petitioner had already entered an objection to the holding of the hearing. See: Appendix C, at 2. The case of Wainwright v. Sykes, 433 U.S. 72 (1977), cited by Respondent is inapplicable because it is a habeas corpus case, and in such cases, federal review of state procedures is limited.

With the respect to the contention by Respondent that "matters of state procedure are not reviewable in a federal form absent a denial of fundamental fairness . . . ," Respondent's Brief, at 6, Petitioner would comment that evidently Respondent is becoming confused between the Writ of Habeas Corpus and the petition for Writ of Certiorari. All of these cases cited to by the Respondent in are habeas corpus cases in which the federal court refused to grant the writ of habeas corpus because of the sancity of state procedures. State procedures, however, are reviewable by the Supreme Court of the United States when a case comes to it on a Writ of Certiorari. Rule 19 of the rules of

the Supreme Court states in pertinent part as follows:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Id.

Petitioner would respectfully submit that it is evident from a review of this case that Respondent was denied his right to a fair trial and due process of law. State procedures with respect to separation of a jury and the presumptions of harm were ignored by both the trial court and the Court of Criminal Appeals. For the State to blatantly disregard the procedures available, and for the State to manufacture a procedure which violates the Sixth Amendment to the United States Constitution, is a violation of due process of law, because it does not give a defendant fair notice.

E.

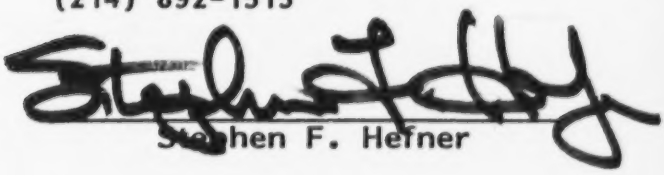
CONCLUSION

For all of the reasons stated above, Petition-

er prays that his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

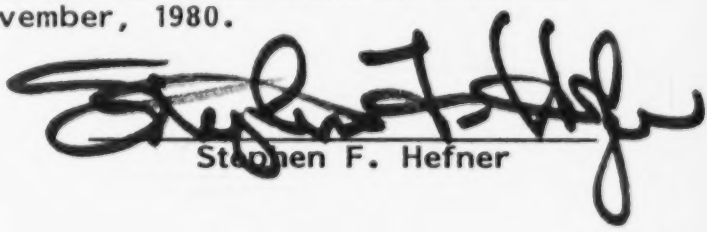
STEPHEN F. HEFNER & ASSOCIATES
109 West Houston Street
Sherman, Texas 75090
(214) 892-1515



Stephen F. Hefner

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the above and foregoing Reply of Petitioner was this date mailed by me to Mr. Charles A. Palmer, Assistant Attorney General of the State of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, Attorney for Respondent, with proper postage affixed and depositing same in the United States mails on this the 17th day of November, 1980.



Stephen F. Hefner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

PARIS DIVISION

SAM McDonald,	§
Petitioner	§
	§
V.	§
CIVIL ACTION NO. P-80-18-CA	§
W. J. ESTELLE, JR.,	§
DIRECTOR, TEXAS DEPARTMENT	§
OF CORRECTIONS,	§

RESPONDENT'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, Respondent herein, by and through his attorney, the Attorney General of Texas, and in response to Petitioner's application for writ of habeas corpus files this his Motion to Dismiss, and in support thereof would show the Court the following:

I.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 2241, 2254.

II.

Respondent denies every allegation of fact

made by Petitioner except those supported by the record and those specifically admitted hereinafter.

III.

Respondent has lawful custody of Petitioner pursuant to a judgment and sentence of the 6th District Court of Fannin County, Texas in Cause No. 15862, styled The State of Texas v. Sam McDonald. Petitioner was indicted for the offense of murder, to which he entered a plea of not guilty. He was tried by a jury which on April 20, 1977, found him guilty of the offense of voluntary manslaughter and subsequently assessed punishment at imprisonment for 15 years. Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals on March 19, 1980. McDonald v. State, _____S.W.2d_____(No. 58,823). Petitioner has not filed any applications for state writ of habeas corpus. Copies of the records of Petitioner's trial and appeal are available and will be forwarded to the Court if Respondent is required to file an answer.

IV.

Respondent submits that Petitioner's application should be dismissed for failure to exhaust state remedies as required by 28 U.S.C. § 2254(b), (c).

V.

Respondent construes Petitioner's allegations to be as follow:

(1) Because Petitioner's hearing is impaired, conduct of the trial without special provision for amplification of the witnesses' and parties' voices:

(a) Deprived Petitioner of due process of law;

(b) Denied Petitioner the right to confront the witnesses against him;

(c) Denied Petitioner the right to a fair and impartial trial;

(d) Prevented Petitioner from receiving effective assistance of counsel;

(2) The court's charge denied Petitioner due process and equal protection of the law and the right to a fair trial;

(3) The laws of the State of Texas with regard

to defense of a habitation are unconstitutional; and

(4) The trial court's conduct of a post-trial hearing in order to ascertain whether Petitioner was harmed by the separation of the jury without his consent denied him due process of law and the right to a fair trial.

VI.

Petitioner's application for writ of habeas corpus was filed in this Court on May 21, 1980. On June 19, 1980, Petitioner filed a petition for writ of certiorari in the United States Supreme Court, raising one of the grounds contained in the instant application. Respondent submits that Petitioner should not be allowed to pursue his claims in two different federal forums simultaneously. Accordingly, the application for writ of habeas corpus should be dismissed pending disposition fo the petition for writ of certiorari.

VII.

Respondent further submits that the application must be dismissed for failure to exhaust state remedies. Attached to this motion as Re-

spondent's Exhibit A are copies of two pages from Petitioner's appellate brief which list the grounds of error asserted therein. The claims advanced in the instant application relating to Petitioner's impaired hearing and the unconstitutionality of certain Texas laws were not among those presented to the Texas Court of Criminal Appeals for that Court's consideration. Consequently, the application must be dismissed for failure to exhaust state remedies. 28 U.S.C. § 2254(b), (c); Fay v. Noia, 372 U.S. 391, 420, 83 S.Ct. 822, 839, (1963); Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509 (1971); Galtieri v. Wainwright; 582 F.2d 348 (5th Cir. 1978) (en banc).

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully requests that Petitioner's application for writ of habeas corpus be dismissed pending disposition of his petition for writ of certiorari filed in the United States Supreme Court. In the alternative, Respondent respectfully requests that the application be dismissed for failure to exhaust state remedies.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Charles A. Palmer, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent's Motion to Dismiss has been served by placing same in the United States mail, postage prepaid, certified, return receipt requested, on this the 8th day of October, 1980, addressed to:

Stephen F. Hefner
Attorney for Petitioner
109 West Houston Street
Sherman, Texas 75090

/s/ Charles A. Palmer
CHARLES A. PALMER
Assistant Attorney General













